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COURT REFORM LEGISLATION

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1529

A BILL TO ESTABLISH A NATIONAL COURT OF APPEALS, AND
FOR OTHER PURPOSES

S. 1531

A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY
PROVIDING GREATER DISCRETION TO THE SUPREME COURT
IN SELECTING THE CASES IT WILL REVIEW AND FOR
OTHER PURPOSES

AND

S. 1532

A BILL TO AMEND THE FEDERAL RULES OF CRIMINAL
PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE
WITH RESPECT TO EXAMINATION OF PROSPECTIVE JURORS

NOVEMBER 16, 1981

Serial No. J-97-81

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CONTENTS

OPENING STATEMENT

Heflin, Hon. Howell, a U.S. Senator from the State of Alabama.....	Page 1
--	-----------

PROPOSED LEGISLATION

S. 1529, a bill to establish a National Court of Appeals, and for other purposes....	3
S. 1531, a bill to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review and for other purposes.....	14
S. 1532, a bill to amend the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure with respect to examination of prospective jurors	18

CHRONOLOGICAL LIST OF WITNESSES

Hruska, Roman, a former U.S. Senator from the State of Nebraska.....	20
Hufstedler, Shirley, representing the American Bar Association, Los Angeles, Calif	24
Levin, Prof. A. Leo, Director, Federal Judicial Center, Washington, D.C.....	26
Cameron, James Duke, justice, Arizona Supreme Court, Phoenix, Ariz.....	86
Pickering, John H., attorney, Wilmer, Cutler & Pickering, Washington, D.C....	87
Cutler, Ed, attorney, American Bar Association, Tampa, Fla	138
Foley, Adrian, vice chairman, litigation section, American Bar Association, Newark, N.J.....	198
Cleary, John, executive director, Federal Public Defender Office, San Diego, Calif	202
Arness, John, attorney, American College of Trial Lawyers, Washington, D.C..	205
Hare, Francis H., Jr., attorney, American Trial Lawyers Association, Birmingham, Ala	206

ALPHABETICAL LISTING AND SUBMITTED MATERIAL

Arness, John P.:	
Testimony	205
Prepared statement	216
Cameron, James Duke:	
Testimony	86
Prepared statement	93
Cleary, John:	
Testimony	202
Prepared statement	215
Cutler, Ed:	
Testimony	138
Prepared statement	141
Foley, Adrian:	
Testimony	198
Prepared statement	214
Hare, Francis H., Jr.:	
Testimony	206
Prepared statement	220
Letter to Senator Howell Heflin from Dennis R. Roberts, president, California Attorneys for Criminal Justice, Los Angeles, Calif	210

IV

	Page
Hare, Francis H., Jr.—Continued	
"Voor Dire Examination and Jury Selection," anatomy of a personal injury law suit.....	224
Letter from Wm. R. Wilson, Jr., Arkansas Trial Lawyers Association.....	242
Heflin, Senator Howell: "Mandatory Appellate Jurisdiction of the Supreme Court of the United States," an analysis of Senate bill 1531 by the Library of Congress, CRS, prepared by Leland E. Beck, legislative attorney.....	145
Hruska, Roman:	
Testimony.....	20
Prepared statement.....	43
Hufstedler, Shirley:	
Testimony.....	24
Prepared statement.....	54
Order list for October 5, 13, and 19, 1981.....	56
Additional statements:	
April 1, 1974, to the Commission on Revision of the Federal Court Appellate System.....	58
May 19, 1976, before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate.....	65
July 21, 1977, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives.....	72
Levin, Prof. A. Leo:	
Testimony.....	26
Prepared statement.....	77
Pickering, John H.:	
Testimony.....	87
Prepared statements of:	
John P. Frank, in behalf of himself and Hon. Clement F. Haynsworth, Jr., and Dean Erwin N. Griswold.....	109
Jonathan Rose.....	120

COURT REFORM LEGISLATION

MONDAY, NOVEMBER 16, 1981

U.S. SENATE,
SUBCOMMITTEE ON COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator Howell Heflin (acting chairman of the subcommittee) presiding.

Staff present: Richard W. Velde, chief counsel; Sheila Bair, counsel; Barry Bauman, minority counsel; Linda E. White, chief clerk; Arthur Briskman, minority counsel; Will Lucius, counsel, Committee on the Judiciary; Boyd Hollingsworth, counsel, Subcommittee on Immigration; and Mary Louise Westmoreland, counsel, Subcommittee on Juvenile Justice.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. I will call the hearing to order.

Senator Dole, the chairman of this Subcommittee on Courts of the Committee on the Judiciary, is unable to be here and he has asked me to go ahead and preside. He may be coming during the course of the proceedings.

Today the Judiciary Subcommittee on Courts will consider legislation which will affect the very structure as well as the procedural aspects of the American judicial system. Senate bill 1529 would establish a National Court of Appeals. Senate bill 1531 substantially eliminates mandatory jurisdiction of the U.S. Supreme Court; and Senate bill 1532 would require Federal courts to allow counsel participation in voir dire procedures in connection with the examination of jurors.

I am pleased to be chairing these hearings, and I am grateful for the work that Senator Thurmond, chairman of the Judiciary Committee, and Senator Dole, the subcommittee chairman, and their capable staffs have contributed to this effort.

Article 3 of the Constitution states that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." However, the need to consider this legislation today arises from the tremendous increase in our Nation's population and the ever-growing complexity of a modern society which were not so apparent some 200 years ago.

In the early days of our Republic the way of life was relatively simple. Our country was sparsely populated. Today's more varied and complex lifestyle has imposed great burdens on our judicial

system. Litigation has exploded as we ask the courts to adjudicate conflicting rights in areas of law which were virtually unknown and possibly beyond the comprehension of man just a few years ago. This explosion of litigation has clogged absolutely all levels of our court systems.

The U.S. Supreme Court had a docket of 492 cases in 1890. They appealed at that time to Congress to give them some relief. Congress responded by creating nine circuit courts of appeal. This relief reduced the docket of the U.S. Supreme Court to 275 cases. Since then the number of cases docketed has steadily increased. As recently as 30 years ago, the Court had 1,353 cases on its docket for review. It increased to 2,570 cases by 1971, and the number of cases before the Supreme Court for review in very recent years approaches between 4,000 and 5,000 cases.

These numbers take on special significance in view of the fact that the Supreme Court has only been capable of reviewing around 150 of these cases on a yearly basis, that is, on a full-blown scale. Remarkably, I believe last year the U.S. Supreme Court reached a decision in 279 cases. Around 150 or 160 were by full-blown opinions and were handled on that basis; the remainder were by filed opinions. Surprisingly, that 279 is close to the 275 that the Court had as its docket in 1892, after Congress had given relief to the U.S. Supreme Court.

Thus, as the number of cases submitted for review grows even greater, the proportion of cases actually given attention by the Court stays almost the same. In recent years the Court has determined only around 5 or 6 percent of the cases seeking review. The result is that numerous cases which merit review and which affect our fundamental constitutional rights are not being granted consideration. There have to be many more matters that are crying out for consideration.

Crowded dockets and backlogs are but a part of the problem. Lack of uniformity in national law and the inability of appellate jurisdictions to resolve conflicts between them produces uncertainty and more delay. It is impossible for attorneys to advise clients intelligently in such an atmosphere. As a member of the State judiciary of Alabama, I have recognized the real possibility of unequal treatment of litigants which threatens the confidence our citizens have in the judicial system.

The first bill we examine today is Senate bill 1529, which established a National Court of Appeals. This is not a new concept. It has undergone extensive scholarly study in the past decade. Both the Freund Commission in 1971 and the Hruska Commission in 1975 completed extensive research on this topic and recommended to Congress a National Court of Appeals. Although the suggested method may have differed, these two studies were unanimous in their recommendation that a national court be established.

We are fortunate today that some of the participants in these commissions are able to share their views with us today. I am sincerely hopeful that by reexamining this issue, a foundation will be established for future improvement of our national court system.

[The text of bills S. 1529, S. 1531, and S. 1532 follows:]

97TH CONGRESS
1ST SESSION

S. 1529

To establish a National Court of Appeals, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 29 (legislative day, JULY 8), 1981

Mr. HEFLIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish a National Court of Appeals, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "National Court of Ap-
4 peals Act of 1981".

5 ESTABLISHMENT OF COURT

- 6 SEC. 2. (a) Part I of title 28, United States Code, is
7 amended by inserting immediately after chapter 1 of such
8 title the following new chapter:

1 **"CHAPTER 2—NATIONAL COURT OF**
2 **APPEALS**

"Sec.

"21. Establishment and composition of court.

"22. Chief judge; precedence of associate judges.

"23. Tenure; salary, and retirement.

"24. Principal seat and terms.

"25. Seal.

"26. Sessions.

"27. Hearings and quorum.

"28. Disqualification of judges.

3 **"§ 21. Establishment and composition of court**

4 **"(a) There shall be a National Court of Appeals which**
5 **shall be composed—**

6 **"(1) of a chief judge appointed by the President,**
7 **by and with the advice and consent of the Senate; and**

8 **"(2) eight associate judges appointed by the Presi-**
9 **dent, by and with the advice and consent of the**
10 **Senate; and**

11 **"(b) The Chief Justice of the United States Supreme**
12 **Court, upon a request by the chief judge of this court, may**
13 **assign judges from circuit courts of appeals on a temporary**
14 **basis to sit and act at such times and places as is necessary**
15 **to carry out the purposes of this chapter.**

16 **"§ 22. Chief judge; precedence of associate judges**

17 **"(a) If the chief judge is temporarily unable to perform**
18 **his duties as such, or if such chief judge resigns or retires,**
19 **such duties shall be performed by the associate judge who,**
20 **according to seniority, is next in precedence.**

1 “(b) The associate judges shall have precedence accord-
2 ing to the seniority of their commissions. Associate judges
3 whose commissions bear the same date shall have precedence
4 according to seniority in age.

5 “§ 23. Tenure, salary, and retirement

6 “(a) The judges of the National Court of Appeals shall
7 hold office during good behavior.

8 “(b) Each judge of the National Court of Appeals shall
9 receive a salary at the same annual rate as judges of the
10 circuit courts of the United States pursuant to section 225 of
11 the Federal Salary Act of 1967 (2 U.S.C. 351-361), as ad-
12 justed by section 461 of this title.

13 “(c) The judges of the National Court of Appeals shall
14 be subject to the resignation and retirement provisions of
15 chapter 17 of this title.

16 “§ 24. Principal seat and terms

17 “The principal seat of the National Court of Appeals
18 shall be in the District of Columbia. The court may sit at
19 such times and places within the United States as the court
20 may designate.

21 “§ 25. Seal

22 “The National Court of Appeals shall have a seal which
23 shall be judicially noticed.

1 "§ 26. Sessions

2 "The time and place of the sessions of the National
3 Court of Appeals shall be prescribed by the chief judge pur-
4 suant to rules of the court.

5 "§ 27. Hearings and quorum

6 "(a) The chief judge shall be responsible for the adminis-
7 tration of the court.

8 "(b) The court may authorize the hearing and determin-
9 ing of cases and controversies by separate panels, each con-
10 sisting of three, five, seven, or nine judges as the court deter-
11 mines. Such panels shall sit at the times and places and hear
12 the cases and controversies assigned as the court directs.

13 "(c) The Court of Appeals judges shall sit on the court
14 and its panels in such order and at such times as the court
15 directs.

16 "(d) The court may order a hearing or rehearing before
17 the court en banc. A court en banc shall be comprised of
18 judges in regular active service pursuant to the provisions of
19 this chapter. In addition, a court en banc shall include those
20 circuit court of appeals judges who served on the panel which
21 originally heard the case in question.

22 "§ 28. Disqualification of judges

23 "No judge shall hear or determine an appeal from the
24 decision of a case or issue therein heard or tried by such
25 judge."

1 (b) The analysis of part I of title 28, United States
 2 Code, is amended by inserting immediately below the item
 3 relating to chapter 1 of such part, the following new item:

"2. National Court of Appeals..... 21".

4 OFFICERS AND EMPLOYEES

5 SEC. 3. (a) Part III of title 28, United States Code, is
 6 amended by inserting immediately after chapter 45 of such
 7 title, the following new chapter:

8 "CHAPTER 46—NATIONAL COURT OF
 9 APPEALS

"Sec.

"691. Clerk and employees.

"692. Law clerks and secretaries.

"693. Librarian, marshal, and bailiffs.

10 "§ 691. Clerk and employees

11 "(a) The National Court of Appeals may appoint a clerk
 12 who shall be subject to removal by the court. The court may
 13 appoint or authorize the appointment of such other officers
 14 and employees in such number as may be approved by the
 15 Director of the Administrative Office of the United States
 16 Courts.

17 "(b) The officers and employees of the court shall be
 18 subject to the removal by the court or, if the court so deter-
 19 mines, by the clerk or other officer who appointed them, with
 20 the approval of the court.

21 "(c) The clerk shall pay into the Treasury all fees, costs,
 22 and other moneys collected by him and make returns thereof

1 to the Director of the Administrative Office of the United
2 States Courts under regulations prescribed by him.

3 "§ 692. Law clerks and secretaries

4 "The judges of the National Court of Appeals may ap-
5 point such law clerks and secretaries as may be necessary.

6 "§ 693. Librarian, marshal, and bailiffs

7 "(a) The National Court of Appeals may appoint a li-
8 brarian and necessary library assistants who shall be subject
9 to removal by the court.

10 "(b) The National Court of Appeals may appoint a mar-
11 shal, who shall be present whenever the court is in session,
12 be custodian of its courthouse, have supervision over its cus-
13 todial employees, take charge of all property of the United
14 States used by the court or its employees, and perform such
15 other duties as the court may direct. The marshal shall be
16 subject to removal by the court. The marshal, with the ap-
17 proval of the court, may employ necessary bailiffs. Such bail-
18 iffs shall attend the court, preserve order, and perform such
19 other necessary duties as the court or marshal may direct.
20 The bailiffs shall receive the same compensation as bailiffs
21 employed for the district courts."

22 (b) The analysis of part III of title 28, United States
23 Code, is amended by inserting immediately below the item
24 relating to chapter 45 of such title the following new item:

"46. National Court of Appeals..... 691"

JURISDICTION AND REVIEW

SEC. 4. (a) Part IV of title 28, United States Code, is amended by adding immediately after chapter 81 of such title the following new chapter:

"CHAPTER 82—NATIONAL COURT OF APPEALS

"Sec.

"1271. Jurisdiction.

"1272. Finality of decisions.

"§ 1271. Jurisdiction

"The National Court of Appeals shall have jurisdiction of cases referred to it by the Supreme Court.

"§ 1272. Finality of decisions

"(a) The National Court of Appeals may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case.

"(b) Unless modified or overruled by the Supreme Court, the decisions of the National Court of Appeals shall be binding on all courts of the United States, and, with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts."

(b) Chapter 81 of title 28, United States Code (relating to the jurisdiction of the Supreme Court), is amended by adding at the end thereof the following new section:

"§ 1259. National Court of Appeals

"(a) After denying certiorari or in lieu of noting probable jurisdiction of an appeal in any case before it, the Supreme

1 Court may refer any such case to the National Court of Ap-
 2 peals. The Supreme Court may, and in cases subject to
 3 review by appeal shall, direct the National Court of Appeals
 4 to decide any case so referred.

5 “(b) Any case in the National Court of Appeals may be
 6 reviewed by the Supreme Court by writ of certiorari granted
 7 upon the petition of any party to any such case before or
 8 after rendition of judgment or decree.”.

9 (c)(1) The analysis of part IV of title 28, United States
 10 Code, is amended by inserting immediately below the item
 11 relating to chapter 81 of such title, the following new item:

“82. National Court of Appeals..... 1281”.

12 (2) The analysis of chapter 81 of title 28, United States
 13 Code, is amended by adding at the end thereof the following
 14 new item:

“1259. National Court of Appeals.”.

15 TECHNICAL AND CONFORMING AMENDMENTS

16 SEC. 5. (a)(1) The first paragraph of section 331 of title
 17 28, United States Code, is amended by inserting immediately
 18 after “shall summon annually” the following: “the chief
 19 judge of the National Court of Appeals,”.

20 (2) The third paragraph of such section 331 is amended
 21 by inserting immediately before the first sentence the follow-
 22 ing new sentence: “If the chief judge of the National Court of

1 Appeals is unable to attend, the Chief Justice may summon
2 any other judge from such court.”.

3 (b)(1) Section 372(a) of title 28, United States Code, is
4 amended—

5 (A) by inserting in the third paragraph immediate-
6 ly following “Supreme Court,” the following: “the
7 chief judge of the National Court of Appeals,”; and

8 (B) by inserting in the fifth paragraph, after
9 “Patent Appeals,” the following: “the National Court
10 of Appeals,”.

11 (2) Section 372(b) of title 28, United States Code,
12 is amended—

13 (A) by inserting immediately after “Chief Justice
14 of the United States in the case of” the following: “the
15 chief judge of the National Court of Appeals or”; and

16 (B) by inserting immediately after “chief judge of
17 his court in the case of a judge of the” the following:
18 “National Court of Appeals,”.

19 (c)(1) The second paragraph of section 451 of title 28,
20 United States Code, is amended by inserting immediately
21 after “Supreme Court of the United States,” the following:
22 “the National Court of Appeals,”.

23 (2) The fourth paragraph of section 451 of title 28,
24 United States Code, is amended by inserting immediately

1 after "includes judges of" the following: "the National Court
2 of Appeals,".

3 (d) The second paragraph of section 456 of title 28,
4 United States Code, is amended by inserting immediately
5 after "Justices of the Supreme Court" the following: ", the
6 judges of the National Court of Appeals,".

7 (e) Section 610 of title 28, United States Code, is
8 amended by inserting immediately after "includes" the fol-
9 lowing: "the National Court of Appeals,".

10 (f)(1) Section 1912 of title 28, United States Code, is
11 amended by inserting immediately after "Supreme Court"
12 the following: ", the National Court of Appeals,".

13 (2)(A) Section 1913 of title 28, United States Code, is
14 amended to read as follows:

15 "§ 1913. National Court of Appeals; Courts of Appeals

16 "The fees and costs to be charged and collected in the
17 National Court of Appeals and in each court of appeals shall
18 be prescribed from time to time by the Judicial Conference of
19 the United States. Such fees and costs shall be reasonable
20 and shall be uniform in all the circuits."

21 (B) The item relating to section 1913 of title 28, United
22 States Code, in the analysis of chapter 123 of such title, is
23 amended to read as follows:

"1913. National Court of Appeals; courts of appeals."

1 (g) The first paragraph of section 2072 of title 28,
2 United States Code, is amended by striking out "of the dis-
3 trict courts and courts of appeals of the United States" and
4 inserting in lieu thereof "of the district courts, courts of ap-
5 peals of the United States, and the National Court of Ap-
6 peals".

7 (h) Section 2106 of title 28, United States Code, is
8 amended by inserting immediately after "Supreme Court"
9 the following: ", the National Court of Appeals,".

10 (i) Section 225(f)(C) of the Federal Salary Act of 1967
11 (2 U.S.C. 356) is amended by inserting "and the judges of
12 the National Court of Appeals" before the semicolon.

13 **AUTHORIZATION OF APPROPRIATIONS**

14 **SEC. 6.** There are authorized to be appropriated such
15 sums as may be necessary to carry out the provisions of this
16 title.

97TH CONGRESS
1ST SESSION

S. 1531

To improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 29 (legislative day, JULY 8), 1981

Mr. HEFLIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. Section 1252 of title 28, United States
4 Code, is repealed.

5 SEC. 2. Section 1254 of title 28, United States Code, is
6 amended—

7 (1) by deleting subsection (2);

1 (2) by redesignating subsection (3) as subsection

2 (2); and

3 (3) by deleting "appeal;" from the title.

4 SEC. 3. Section 1257 of title 28, United States Code, is
5 amended to read as follows:

6 **"§ 1257. State courts; certiorari**

7 "(a) Final judgments or decrees rendered by the highest
8 court of a State in which a decision could be had, may be
9 reviewed by the Supreme Court by writ of certiorari where
10 the validity of a treaty or statute of the United States is
11 drawn in question or where the validity of a statute of any
12 State is drawn in question on the grounds that it is repugnant
13 to the Constitution, treaties or laws of the United States, or
14 where any title, right, privilege, or immunity is specially set
15 up or claimed under the Constitution, treaties, or statutes of,
16 or commission held or authority exercised under, the United
17 States.

18 "(b) For the purposes of this section, the term 'highest
19 court of a State' includes the District of Columbia Court of
20 Appeals."

21 SEC. 4. Section 1258 of title 28, United States Code, is
22 amended to read as follows:

23 **"§ 1258. Supreme Court of Puerto Rico, certiorari**

24 "Final judgments or decrees rendered by the Supreme
25 Court of the Commonwealth of Puerto Rico may be reviewed

1 by the Supreme Court by writ of certiorari where the validity
 2 of a treaty or statute of the United States is drawn in ques-
 3 tion or where the validity of a statute of the Commonwealth
 4 of Puerto Rico is drawn in question on the grounds that it is
 5 repugnant to the Constitution, treaties, or laws of the United
 6 States, or where any title, right, privilege, or immunity is
 7 specially set up or claimed under the Constitution, treaties,
 8 or statutes of, or commission held, or authority exercised
 9 under, the United States.”.

10 SEC. 5. The analysis at the beginning of chapter 81 of
 11 title 28, United States Code, is amended to read as follows:

12 **“CHAPTER 81—SUPREME COURT**

“Sec.

“1251. Original jurisdiction.

“1252. Repealed.

“1253. Direct appeals from decisions of three-judge courts.

“1254. Court of appeals; certiorari; certified questions.

“1255. Court of Claims; certiorari; certified questions.

“1256. Court of Customs and Patent Appeals; certiorari.

“1257. State courts; certiorari.

“1258. Supreme Court of Puerto Rico; certiorari.”.

13 SEC. 6. Section 310 of the Federal Election Campaign
 14 Act of 1971 is amended—

15 (1) by deleting subsection (b); and

16 (2) by redesignating subsection (c) as subsection

17 (b).

18 SEC. 7. Section 2 of the Act of May 18, 1928 (25
 19 U.S.C. 652) is amended by deleting “, with the right of
 20 either party to appeal to the Supreme Court of the United
 21 States.”.

1 SEC. 8. Subsection (d) of section 203 of the Trans-
2 Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is
3 amended by deleting the last sentence and inserting in lieu
4 thereof the following: "Any review of the interlocutory or
5 final judgment, decree, or order of such district court may be
6 had only upon direct review by the Supreme Court by writ of
7 certiorari."

8 SEC. 9. This Act shall take effect ninety days after the
9 date of enactment. However, it shall not affect cases then
10 pending in the Supreme Court, nor shall it affect the right to
11 review, or the mode of reviewing, the judgment or decree of
12 a court when the judgment or decree sought to be reviewed
13 was entered prior to the effective date of this Act.

97TH CONGRESS
1ST SESSION

S. 1532

To amend the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure with respect to examination of prospective jurors.

IN THE SENATE OF THE UNITED STATES

JULY 29 (Legislative day, JULY 8), 1981

Mr. HEFLIN (for himself and Mr. PRYOR) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure with respect to examination of prospective jurors.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That (a) rule 24(a) of the Federal Rules of Criminal Proce-
4 dure is amended to read as follows:

5 “(a) EXAMINATION.—The court shall permit the de-
6 fendant, or his attorney, and the attorney for the Government
7 to conduct the examination of prospective jurors, and may, in
8 addition to such examination, conduct its own examination.

1 The court may impose such reasonable limitations as it
2 deems proper with respect to the examination of prospective
3 jurors by the defendant or his attorney and the attorney for
4 the Government.”

5 (b) Rule 47(a) of the Federal Rules of Civil Procedure is
6 amended to read as follows:

7 “(a) EXAMINATION OF JURORS.—The court shall
8 permit the parties or their attorneys to conduct the examina-
9 tion of prospective jurors, and may, in addition to such exam-
10 ination, conduct its own examination. The court may impose
11 such reasonable limitations as it deems proper with respect to
12 the examination of prospective jurors by the parties or their
13 attorneys.”

Senator HEFLIN. We are pleased that former U.S. Senator Roman Hruska from Nebraska is with us. He was also the chairman of the Hruska Commission. We are delighted to have you with us at this time and we would be delighted to hear from you, Senator.

**STATEMENT OF ROMAN HRUSKA, A FORMER U.S. SENATOR FROM
THE STATE OF NEBRASKA**

Mr. HRUSKA. I thank you, Mr. Chairman, for your introduction and also for the introductory statement which you made.

There is in the hands of the committee and its staff the prepared statement which I have formulated, and I presume it will be inserted in the record in due form.

Senator HEFLIN. It will be.

Mr. HRUSKA. It is good to get back into these familiar surroundings, Mr. Chairman. A great many events occurred here in the years of my tenure, and of course my interest in this legislation as proposed stems from the years of my membership on the Judiciary Committee, together with the experience I had—a happy one, although it was arduous—of serving as Chairman of the Commission on Revision of the Federal Court Appellate System.

Mr. Chairman, I have in my statement outlined, as is indicated by the table of contents, some of the basic elements of the legislation which is before us. That statement is largely patterned after the outline that is contained in the printed report of the Hruska Commission.

Not having the resources that Members of the Congress have, I was not able to get an update of current figures and statistics and the up-to-date status of the subject. However, I understand that Professor Levin will later deal with that in greater detail, so my default in that connection is very well covered by him once again because often as Director of the Commission which I headed, he did cover whatever failings and shortcomings appeared on the part of any of the members of the Commission.

Mr. Chairman, whatever the statistics are—and of course their impact I think will indicate a continual worsening of the situation—there are certain factors that are stable and I have tried to outline them in my written statement. The report of the Commission which was filed in 1975 put the problem very much in perspective, it seems to me. Those universal values, those constant values and guidelines that are indicated in it still prevail: the inadequacy of the final judicial review process in our Federal court system. That is the core of the whole difficulty.

Now in 1978, in regard to one of the aspects of this problem, there were two dissents in the denial of certiorari in the *Brown Transport* case. I would suggest that members of the committee would profit greatly by the dissenting opinion of Justice White and also of Chief Justice Burger in that instance. It deals with the problem as a whole and it also outlines more specifically the problem with reference to intercircuit conflicts as well as others. I have made reference to it in my statement but I do believe that a scanning of the printed report of the Commission, together with a reading of the *Brown Transport Corp.* case, and the updated figures

that are given here by Professor Levin, will give a good background, statistical as well as otherwise, for the entire problem.

I would like to commend the Senator from Alabama for taking up the cudgels once again in this situation. I call attention to and cite his speech on the floor in introducing this bill, in which the figures are given in terms of percentage of the petitions for certiorari, 4,200 plus in number, and the fact that 289 were granted, and the further analysis as it appears in my statement at page 3.

Following that quotation of the statement from the Senator from Alabama, I made note about one of our very fine witnesses before the Senate Judiciary Committee when we had hearings on this subject in 1976; namely, the gracious lady who sits to my left here, Shirley Hufstедler, who was then judge of the Ninth Court of Appeals. She put it this way, with the intuition of and with penetration of thinking, of which she is possessed.

She pointed out that the Supreme Court now hears fewer than 1 percent of the cases now decided by the courts of appeal. That in itself is a startling figure. I think the filings number some 18,000 or 19,000 a year in the courts of appeal. However, then Judge Hufstедler went on to say that the courts of appeal can neither be right nor harmonious 99 percent of the time. One percent supervision is patently inadequate. It seems to me therein lies the nubbin of the entire situation with which we deal.

I am pleased to see the presence here of Herb Hoffman, a representative of the American Bar Association. That organization in principle has blessed and supports this legislation. The American Adjudicatory Society did likewise, and there are others, but I mention those because they quickly come to mind.

Mr. Chairman, coming down to the bill before us this morning, the concept that it embodies is one whose time is here. In fact, its approval is overdue. I am confident that a careful student of the record and of the things which lie ahead of us will pretty well establish that conclusion. It is hoped, certainly this witness hopes, that there will be continued progress in reaching agreement on a measure that will make an additional step forward.

As the legislation proceeds, it will go through a process of seasoning. All major pieces of legislation do that, all of us know. Mr. Chairman, I have two constructive suggestions to make as my contribution towards the seasoning process.

The first has to do with section 21(b) of the bill. Under that section, the Chief Justice upon request of the National Court's chief judge, may "assign judges from circuit courts of appeal on a temporary basis to sit and to act" and so forth, on the court. Now, the purpose and reason for this section are not entirely clear to this witness.

The Commission considered a wide variety of alternate proposals for selection and tenure of judges. Its report at page 30 reads as follows:

The function of the court is such as to require continuity and stability in its membership; and a process of selection designed to achieve the highest level of quality in its incumbents.

In regard to temporary assignments, the report goes on to say:

Temporary service on a rotating basis by Federal appellate judges sitting on assignment from their respective courts would, in the commission's view, be even more undesirable. A court so composed would lack the stability and continuity that are essential to the development of national law.

It is well to bear in mind, Mr. Chairman, that this National Court of Appeals will formulate national law. Stability and continuity are very important indeed, doctrinal policy and policy continuity. There are other desirable characteristics in this regard which I shall not enumerate here; but I would say this: Occasional visiting colleagues from the outside on a temporary basis, however able and talented they are, might tend to have an adverse disruptive influence on the workings of the court and its ability to engage in its very important task, on which I will comment very briefly soon. In the absence of a useful purpose, section 21(b) probably should be reconsidered, and in my judgment it could be dispensed with. I am perfectly willing to consider any reasoning or any purpose that might have originated, that might have put that in the bill.

The second section that I speak to is section 27(b), and that reads in part as follows:

The court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of 3, 5, 7, or 9 judges as the court determines.

This section should be thoroughly examined and reconsidered. In my opinion it is unwise in its present form.

Cases referred to the National Court and heard by it are of like importance, nature, and quality as those which are retained by the Supreme Court and decided by it. But for the fact that time resources do not permit, the Supreme Court would hear and determine that. The National Court should accord these referred cases such processing in manner and execution as will be as nearly as possible comparable to the standards and qualities which the Supreme Court applies to its work. Assignment of cases to panels of the National Court would fail in this regard.

It is imperative that the National Court produce the best result, the best possible result. It must do so to enable it to earn and maintain respect, which it must command to secure acceptance and confidence as a useful entity in the Federal court system. Functioning by panels would tend to impair and maybe even forfeit acceptance and confidence.

The Supreme Court does not use panels. It might be said that there are constitutional restraints on panels; that there should be one Supreme Court and therefore it cannot divide. However, Chief Justice Burger takes that into consideration when, in his letter to the Commission in May 1975, he wrote the following:

It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels but such proposals would meet with almost universal opposition, even assuming their constitutionality.

Now the aversion to panels or divisions in the Supreme Court should apply with full force to this proposed court. It is not the alter ego of the Supreme Court; it is no substitute for the Supreme Court but it operates at a level which quickly ripens into national law, with the implied blessing by the Supreme Court if the Supreme Court does not grant the request for a review.

In all fairness to the Supreme Court, which can be called upon to make that review, the National Court should always sit en banc. This would assure quality results of the highest degree, thus warranting confidence and acceptance by the Supreme Court. Decisions by panels simply would not suffice for that purpose.

As to the request to the Supreme Court for review of the National Court decisions, the Commission on Revision had this to say in its report: "We anticipate, however, that few decisions of the National Court in cases which come before it from the Supreme Court would be reviewed thereafter by the Supreme Court." That is reasonable. I think it can be expected in all good faith that that will follow.

The decision will be made when the original reference would be made to the National Court of Appeals: "Decide this case or consider it for decision." Whatever that decision is, barring the rarest of instances where there would be some extreme misstep of miscalculation of some kind, as a matter of policy there would be a tendency on the part of the Supreme Court which would say,

We made that decision. We will abide by this result which, even by reason of the fact that it is in the Supreme Court at all, could go one way or the other without transgressing the rules, the feeling of reason by reasonable people.

Therefore, in all good faith and toward reaching the goal that the Supreme Court would not grant many requests for review of the National Court of Appeals, in all good faith and toward reaching that goal, the National Court should be required to sit en banc.

Now the conclusion of my statement has to do with a summary of what the National Court would do in its final form. There are many benefits. I shall not recite them orally here but I do believe that that recitation, which is a distillation of the report of the Commission—which I believe was well considered, well documented and well reasoned—that summary which I put in my statement puts it in brief, concise form.

I do hope that the work of this subcommittee will start the momentum toward a new and fruitful progress in this field, and that it will ripen into legislation, if at all possible, in this Congress.

I thank you, Mr. Chairman.

Senator HEFLIN. Thank you, sir. If you are not in a hurry, Mr. Hruska, I would like to go ahead with Judge Hufstedler and Mr. Levin and then go into some questions, if that would be convenient with you. Is that convenient?

Mr. HRUSKA. It would be very agreeable to us.

Senator HEFLIN. Judge Hufstedler, do you have some time? I was thinking that we would have all three of you make presentations and then we would ask some questions.

Ms. HUFSTEDLER. I am at the service of the committee.

Senator HEFLIN. Thank you.

We are delighted to have Judge Shirley Hufstedler, who was a member of the U.S. Circuit Court of Appeals for the Ninth Circuit and then was the Secretary of Education under the Carter administration.

Judge Hufstedler, it is an honor that you appear before this committee.

STATEMENT OF SHIRLEY HUFSTEDLER, REPRESENTING THE
AMERICAN BAR ASSOCIATION, LOS ANGELES, CALIF.

Ms. HUFSTEDLER. Thank you very much, Mr. Chairman.

It is a pleasure to appear before this committee in support of the concept of the National Court of Appeals, an idea whose time has more than come.

I have also a prepared statement which has been received and lodged with the committee, and that I trust in due course will be made part of the record.

Mr. Chairman, Senator Hruska has ably pointed out the realities that led the Hruska Commission to recommend strongly the creation of a National Court of Appeals, and every reason that was then present is present in fuller force today. As the committee is well aware, Mr. Chairman, a number of developments have occurred since the Hruska Commission filed its report that have made ever more pressing the alteration of the structure of the Federal appellate judicial system.

The Senate and the House have appropriately seen fit to expand the number of judges in the lower Federal courts, an essential if we were to begin to handle the burgeoning case loads that characterize those courts. Therefore, the difficulty of reviewing decisions in the lower Federal courts has increased as both the number of judges and the number of courts in the Federal system have increased. That is a necessary byproduct of the added decisional capacity of the lower Federal courts but it has exacerbated the pressures on the upper levels of the system that make even more pressing than before the concept which is embodied in the legislation that we are addressing today.

I may add that I have requested and received from the Supreme Court a list of statistics. I am confident that Professor Levin will fill those in when he testifies but I did want to note that just in this last month, the commencement of the new term of Court, even omitting the several cases in which Justices Brennan and Marshall noted dissents in the death penalty cases, there are 21 cases noted in that docket in which members of the Court expressed the view that certiorari should have been granted.

Now we cannot know every reason for every notation, absent the existence of a dissent, but we do know a great deal about that from the published dissents, some of which have been adverted to earlier in the testimony by Senator Hruska, notably the dissent by Justice White. In short, the Court is telling us in the only way the Court really can that the Court does not have the decisional capacity to meet the ever more pressing needs for creating a body of national law beyond the capability in terms of time for the Supreme Court of the United States.

I shall not repeat the statement that I made in writing, and of course there is also before the committee testimony that I have given on this subject on a number of different occasions. Therefore, Mr. Chairman, with your permission I would like simply to note several reservations that I have about the present design of the bill. I also share the reservations expressed by Senator Hruska that he has noted.

I would suggest for the consideration of the draftsmen that one does not have an en banc proceeding for that court, which in my view would unnecessarily elongate the processes of the court. The necessity for an en banc provision, of course, does not exist if the court does not sit in panels. Whether or not the court sits in panels, however, I would still eliminate the proceeding for en banc.

Second, the draftsmen may consider another feature of section 27, subsection (b): In my view it would be inappropriate to give that court the power to decide whether it would hear particular cases by panels of three, five, seven, or nine. It seems to me that that does not create the stability and it is not an appropriate thing for a court to do that has the kind of dramatic jurisdiction that this court would have.

The committee might consider, for example, as an alternative to set the number of persons who sit at seven, thereby not appearing to be a mirror—a small and distorted image—of the Supreme Court of the United States—but nevertheless having enough persons as members of that court to give the kind of prestige to overrule decisions by panels of three in courts of appeal of the United States, and as will appear from time to time, to overturn decisions of State courts of last resort. A three-judge panel is simply not acceptable as a means for overturning other three-judge panels or, painful though it sometimes must be, to overturn State court decisions of courts of last resort.

If this is to be a freestanding court—and that is the design of the bill, Mr. Chairman—it might be appropriate to consider having 11 judges of the court, even though they sit always in panels of 7. The purpose is to be sure that the court always has enough persons who are not disqualified to form a full panel. One never wants to have a court with such difficulties. In particular cases a combination of illness, absence, vacation, or disqualification may mean the court is paralyzed from acting.

It also expands reasonably but not unduly the decisional capacity of the court because even if the court does sit seven at all times, it permits rotation off the sitting court to permit those judges to have greater flexibility in preparing for calendars. In short, it meets the problems that Senator Hruska has already articulated and at the same time does not unduly expand the capacity of the court.

These, however, while more than details, are not the heart of the proposal. I commend the committee for continuing the effort to find a resolution for what is in fact a necessity. The need is carefully, meticulously, and expeditiously, to create a National Court of Appeals to serve as an overflow court for the Supreme Court of the United States, and to permit the kind of stability and predictability which you, Mr. Chairman, have so ably presented in your remarks on the floor of the Senate and your remarks this morning.

Mr. Chairman, in absence of other questions or until questioned, I will now thank the committee.

Senator HEFLIN. We would like to have entered in the record your full statement and any attachments there that you might have of other articles that have been written.

Ms. HUFSTEDLER. Surely. I would be glad to.

Senator HEFLIN. We are pleased to have Prof. Leo Levin, the director of the Judicial Center of the United States—here in Wash-

ington, D.C., who has been giving thought to the problems of the Federal court system, State court system, judicial system, as either an academic or a practitioner, in his position as director of the Judicial Center for a few years. We are delighted to have you with us.

STATEMENT OF PROF. A. LEO LEVIN, DIRECTOR, FEDERAL JUDICIAL CENTER, WASHINGTON, D.C.

Mr. LEVIN. Thank you very much, Mr. Chairman.

I am honored to be here, particularly as one of so distinguished a roster of witnesses. I have submitted a statement and trust it would be appropriate to have it of record.

Senator HEFLIN. It will be made part of the record.

Mr. LEVIN. Thank you, Mr. Chairman.

I noted there that I would like just a moment to pay tribute to the happy circumstance that the author of this bill, Senator Heflin, who has contributed so much to judicial administration on the State level—as is well known to everyone here—has now turned his attention to these very pressing problems on the Federal level.

FEDERAL CASELOAD INCREASES

Reference has been made to statistics. Sometimes a picture is worth a thousand words. There are three charts on the committee dais. I wonder if we could first take the one, please, on the district court filings over the last few years. It is a paper chart that you have over there.

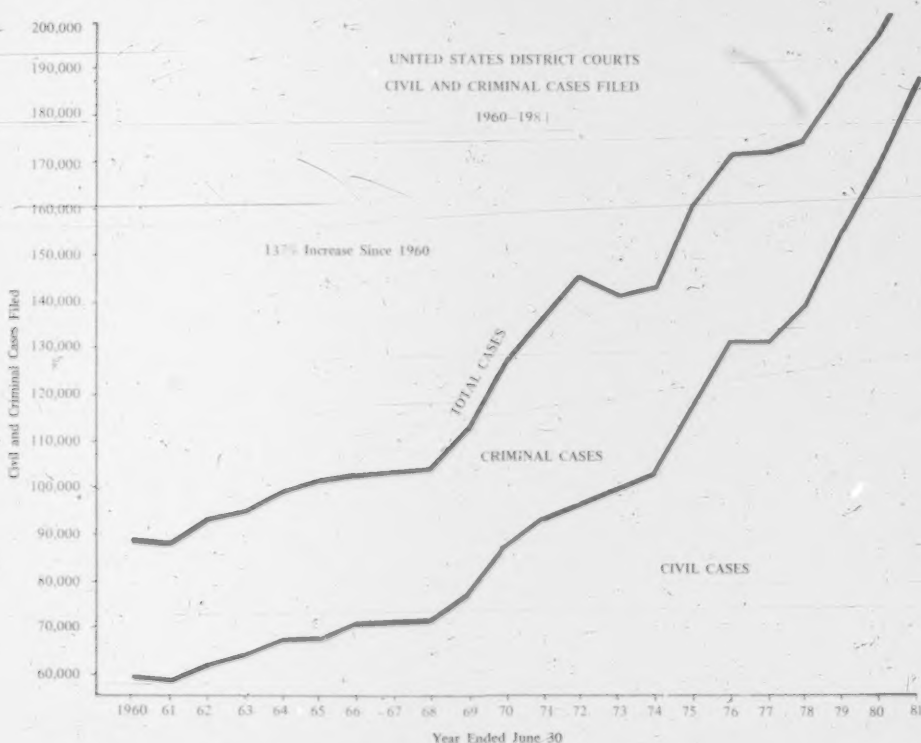


Chart originally prepared for general use at the Seminar on the Administration of Justice, March, 1981, Williamsburg, Virginia, sponsored by the Brookings Institution. The chart was amended subsequent to the hearings to show more recent case statistics

In a nutshell, the Federal judicial system may be seen as a pyramid. Cases start out at the district court level—perhaps two of you could just hold it out, it requires just one of the charts that is marked "district court." I would like to note that in 1960 the filings in the United States district courts were approximately 60,000. By 1981 they are almost 212,000, over 211,000.

Now simply looking at those lines, the civil cases and the number of criminal cases—and for a short stretch the criminal were diminishing—but it is impossible to look—

Senator HEFLIN. If you will bring it over here, please, I believe it might be better for everybody. I want staff to see it. They are the ones that always report to the Senators that are absent. I want them to be able to see the chart, if you will bring it over here where everybody can see it.

Mr. LEVIN. What we are seeing over a very short period of time in terms of the history of the Federal judiciary is an incredibly steep line of increase. This is precisely what is generating the business for the appellate courts. Moreover, there is every indication that this increase—whether the rate of increase goes up or down a little bit—is continuing. As I said, in 1981 there were almost 212,000 cases, 211,863 to be specific, at the district court level.

Let us look now, if we may, at what has happened in the courts of appeal. Could we take the other chart, please?

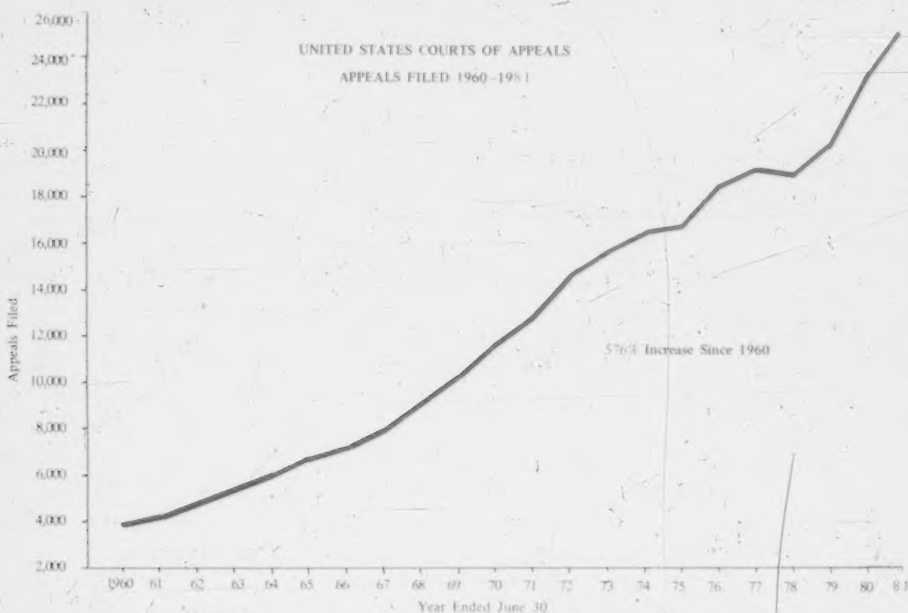


Chart originally prepared for general use at the Seminar on the Administration of Justice, March, 1981, Williamsburg, Virginia, sponsored by the Brookings Institution. The chart was amended subsequent to the hearings to show more recent case statistics.

Senator HEFLIN. Now while we are on this, this would show that in the district courts you have had a 121-percent increase in approximately 20 years.

Mr. LEVIN. Yes.

Senator HEFLIN. That is what it would be since 1960, the total number of cases filed in the district courts.

Mr. LEVIN. If we include 1981, it is climbing even higher than that.

Senator HEFLIN. Do you happen to know anything in regard to judge power, what the number of U.S. district court judges—how many there were in 1960, how many there are—

Mr. LEVIN. I think I have that here. I would have to just look for a moment. There were 245 authorized judges for the district courts in 1960. In 1975, it was 400. It has gone up now to 516 but I can assert to you without question that the per judgeship caseload has been going up the entire time. The per judgeship caseload has been going up the entire time.

As we turn to the courts of appeal, we find that the increase is even more dramatic.

The increase over a period of approximately two decades has been approximately 500 to 600 percent in filings. Over one decade the increase was 100 percent; over two, we are dealing with 500 percent.

In 1981 the filings in the U.S. courts of appeal were over 26,000 cases, and it is not very long ago, about 1960, it had not yet reached 4,000 cases. The rate is dramatic, and I will assert that the full impact of the omnibus judgeship bill—of additional judges generating additional decisions, appealable decisions and appealable orders at the district court level—has not yet been felt on the appellate level because some of those omnibus judgeship positions have not been filled until very, very recently.

Senator HEFLIN. Some of them still have not been filled.

Mr. LEVIN. Thank you for the correction, Mr. Chairman.

If we turn now to the U.S. Supreme Court—

Senator HEFLIN. While we are there, there is another relative matter. I suppose we are building up to the Supreme Court but it would be the increased number of cases filed in the highest court in the State dealing with Federal constitutional issues which would have relevancy. I do not know whether any such studies are available, but from my experience there would be few if any criminal cases now filed that did not have that. Maybe Chief Justice Duke Cameron who is here from the Arizona supreme court may have some figures on some of that which could be very helpful.

Mr. LEVIN. Mr. Chairman, as you point out, the U.S. Supreme Court is basically the apex of two pyramids—first, the one that we have been discussing of the Federal judicial system, and the other for constitutional and Federal questions, of the entire combination of State judicial systems.

A study of the type that you discuss was published by Prof. Preble Stoltz in the California Law Review out of Berkeley a few years ago, and all indications are that the volume of cases generated involving the U.S. Supreme Court in the State system is increasing apace, for the reasons that you have noted.

1949-1980 TOTAL U.S. SUPREME COURT DOCKET



Chart originally prepared for general use at the Seminar on the Administration of Justice, March 1981, Williamsburg, Virginia, sponsored by the Brookings Institution. The chart was amended subsequent to the hearings to show more recent case statistics.

Now if we take a look at the U.S. Supreme Court data—and I could explain that little aberration in the middle—but if you would basically take the look at the general run as opposed to a straight line, it is basically the same kind of thing. It is equally impressive, and we have here that last term the Court had on its docket 5,144 cases.

Senator HEFLIN. 5,000?

Mr. LEVIN. 5,144 cases at its last term.

Now let me just say, as you noted, the cases argued have held about steady—somewhere around 150, occasionally a few more—steady over the last number of years. At one point, Mr. Justice White points out, it was about 100 and he would prefer to go back to the time when he first came on the Court, when plenary consideration was only given to 100 and they could have the time to deal with 100 cases in that way.

However, let me just say that there is absolutely no ambiguity in the statistics. People can argue about it but the Court has spoken. Reference has been made to the *Brown Transport* opinion. Really what happened there is that Justice White joined by Justice Blackmun, dissented from the denial of certiorari with a memorandum by the Chief Justice saying, "I cannot join you in dissent in this case but I agree with your basic thrust," and Justice White, in essence, "here is case after case which is deserving of being heard, it is deserving of having a question in the law resolved, and we simply do not have the appellate capacity to do so."

I think the point that should be made is that the question is not whether there is a crisis viewed in the abstract. What about the litigants? What about the incredible volume of relitigation? What about the doubt of not knowing what the law is for maybe 10 years after the promulgation of regulations in the tax field? There is an example I set forth in my prepared statement. It is the litigants who are paying for this multiplicity of hearings, of administrative conferences, of doubt as to what the law is.

Frankly, the chairman referred in his opening statement to the summary procedures of the U.S. Supreme Court, it is the litigants in the lower courts who are paying a tremendous price as a result of those necessary but unfortunate summary affirmances and dismissals for want of a Federal question. The Court itself has basically said, unambiguously: "In theory it is a decision on the merits but please do not assume that we really mean it. Please do not assume that you can rely even on a series of summary affirmances." Therefore, it simply contributes to the added cost of litigation, to the added uncertainty in the law, to the penalty the Government and the taxpayers and the citizenry pay.

OPERATION OF PROPOSED TRIBUNAL

I would like, Mr. Chairman, if I may just to turn to one or two other points and leave time for questioning. The first is reference jurisdiction as has been provided in this bill is practicable. It can work. Why do I say so? Some theoreticians have raised questions, have submitted statements saying it would burden the Supreme Court, but the fact is that a few years ago at the time of the

Hruska Commission report, each of the Justices was invited to comment.

I think it fair to say that of all nine Justices, a majority favored the proposal, certainly in broad terms. An additional one said in essence, "The time for such a change is likely to come even if it is not yet here," and much has transpired during that intervening period. Some opposed it but even so strong an opponent as Mr. Justice Brennan said he saw no reason why reference jurisdiction could not work if it were enacted.

Not a single Justice—even though each one had some doubts about other aspects not relevant here because this bill wisely does not include other forms of jurisdiction—not one said that reference jurisdiction would be impracticable or would add to the burden of the Court. Therefore, I think it is clear on the record that those who know best view this as a practical, practicable method of providing jurisdiction for an intermediate appellate court.

Finally, I join Senator Hruska and Judge Hufstедler in raising questions in my statement, which I shall not repeat here, about precisely those sections of the bill that they discussed involving the panels and involving the en banc, if we recognize that the coherence and stability of Federal law is a prime motivation for this kind of proposal.

I thank you, Mr. Chairman.

SUPREME COURT CASELOAD

Senator HEFLIN. There has been added here on your chart with either a pencil or a ballpoint pen showing where we are in 1980, rising up to your 5,200 mark. I have seen a chart similar to this. Maybe if that coloring could be added to it before it is put in the record it would indicate the most recent date. This chart would show that you are well over the 5,000—

Mr. LEVIN. Mr. Chairman, it was not our property and so I did not feel at liberty to change it, but I will seek permission and have a picture taken of it.

Senator HEFLIN. If you would, we would like to have these and introduce these charts into the record, in order that we might have it showing 1980. Is there any present indication of when these were taken? For example, if they were at the beginning of a term year then you would be able to put 1981 filings. Is this a total of filings that occurred throughout a calendar year?

Mr. LEVIN. I think I should say, Mr. Chairman, they are not necessarily filings. They are not filings. They are filings plus accumulated cases from the previous year, so they represent what was on the docket at the high point for the year and this represents the figure at the end of the term.

Therefore, the 5,144 is the highest and that high point—lest anyone think that there has been a general decrease of significance—the earlier high point was when the Court extended its 1973 term and kept getting petitions for certiorari. That is the reason. Therefore, this is the high point of the terms. It will not be available for the 1981 term until the end of the term. It is the total number that were on the docket in that term.

Senator HEFLIN. Now this chart on the U.S. Supreme Court starts in 1949. The charts that you have here start in 1960. Now as you would go up, you would find that there was—well, not for the big year of 1973 which is here, in which you went over 5,000—you would have a generally similar increase except here in 1976 and 1977. Is there any explanation for why those appear to be—well, 1977 seems to be your low year. It dropped down to about 4,700 or something like that.

Mr. LEVIN. Yes. Perhaps Judge Hufstedler would like to comment.

In 1973 the Court extended its terms as a result of the tape cases, and the petitions for certiorari kept coming in for that extended period. Moreover, the next term was correspondingly shorter than the extended term.

Senator HEFLIN. That is in 1973?

Mr. LEVIN. Yes. That was why you had that high point. Thereafter, what you began to get was a brief phenomenon where the in forma pauperis cases were dropping as the paid cases were going up. This was a function of strategy by lawyers and so on, and that could make a separate analysis of the nature of the cases on the docket. However, the basic thrust of the data if we forget the little variations from year to year, is that the caseload is just clearly headed upward at a very impressive rate.

I wonder if Judge Hufstedler wants to comment further on that?

Ms. HUFSTEDLER. No, I do not think I can add to that explanation. It is the explanation for what appears to be a distortion in the figures. I will only add, Mr. Chairman, because it is a significant figure, that the latest figures that I have received from the Court—which may be very telling indeed there are the number of cases that have already been accepted for argument this term, and that number is 125. It is November. That includes a significant number of cases—48—that had to be carried over from last term, which indicates how deep the hole is getting in which the Court is finding itself even when it is not taking all of these cases that the individual Justices have indicated they thought should be taken by the Court.

What I am suggesting, of course, is if you look at the figures right now you will see that the decisional capacity is inadequate to carry much more this term, even though of course the petitions will be filed continuously through all the rest of the term. Therefore, the situation is now—I think it is fair to say without being all ultradramatic—it is very serious.

Senator HEFLIN. If we go back to 1892 and you start then with the 275 cases and the increases, do you happen to know, Professor Levin, how many members were on the Supreme Court in 1892? Were there nine or seven or what?

Mr. LEVIN. Senator Hruska tells me it was nine.

Senator HEFLIN. Nine, the same as we have today. It was at that time with a little less than 500 cases that they were crying out for relief and the ninth circuit courts of appeals were created.

Ms. HUFSTEDLER. If I may, Mr. Chairman, I would also like to point out—because I think it is very important in the deliberations of the committee—that raw numbers alone do not tell the whole story. The fact is that the mix of cases that are now moving

through both the Federal and the State court systems are not simply heavy in terms of numbers but as you well know, Mr. Chairman, the proportion of extremely complex cases has escalated, if anything even more dramatically than the numerical number of those cases.

Senator HEFLIN. I believe Senator Hruska referred to testimony that you gave before the Hruska Commission indicating that only around 1 percent of the decisions of the circuit courts of appeals were reviewed in a full plenary manner by the U.S. Supreme Court.

Ms. HUFSTEDLER. That is true. Indeed, as you can readily see when you examine the numbers today, even that very small amount of review is going to go down necessarily with the dramatic increase in filings.

Mr. HRUSKA. Mr. Chairman, may I ask for time to make a little comment here? In addition to the increased complexity of these cases, and therefore the reluctance to depend only on the number of cases, is this phenomenon which is in progress—and it started probably in the early sixties and certainly by the middle sixties—and that is the reversal in the proportion of the number of constitutional questions in the cases involved and so-called private litigation.

At one time Dean Griswold, I believe it was, who testified before the committee, said that up until about the time that such proportion started changing, it was something like this: 70 to 75 percent of so-called private litigation, and the balance of them were constitutional questions which inhered in the case that was appealed and reviewed.

Now that proportion is completely reversed, and from two-thirds to three-fourths of the cases are in the constitutional field and the balance are to be found in the private litigation, so that private litigation—seeing that there would be a tendency to give preference to important constitutional questions—has almost virtually been not ignored but certainly slighted.

That is a phenomenon which will not change, and it is important to this country. After all, to its economy, it, its social structure and so on does not depend entirely on constitutional cases. There are many controversies which go beyond that in private litigation that should be and ought to be heard and disposed of.

Senator HEFLIN. Do any of you know of any study which would indicate the number of conflicts that arise between the now 11 circuits on a periodical basis, either over a 5-year period or a 1-year period or anything?

You seem to be getting out some book, Professor Levin.

Mr. LEVIN. There is, Mr. Chairman, an appendix to the Hruska Commission report that dealt with a study of the number of conflicts. The study showed a significant number, even when measured very rigorously, but it is totally out of date now. What has happened, for example, is that we have increased the number of circuits. More than that, we have increased the number of judgeships so that we have increased geometrically the number of panels.

In the ninth circuit some years ago they had as many as 80-some judges sitting on panels of the court in a single year and over 60 writing for the court in that year because a district court judge or

a visiting judge would be assigned and would write for the court. Today these figures are just totally outdated because the tremendous growth has made this tremendous difference.

Then by adding another circuit which promises to go its own way, we have added again this opportunity for conflict. Therefore, although I can refer you to the details in here—it is a rather careful, academic analysis, and there is another one, I think, by Posner and Casper—there is certainly enough conflict for grist for a new court.

I refer you again to the comment of Mr. Justice White. He simply listed case by case from one list taken up at one conference of one term of the Court, and there were six pages of listings of cases that he thought were candidates for full hearing by the Court but in which the Court had denied certiorari, refused to hear them.

Senator HEFLIN. Is it true the Administrative Office of the Courts has available a study of the last 5 years and the number of conflicts that have arisen between the circuits?

Mr. LEVIN. I do not know of any such figures.

Senator HEFLIN. You do not know whether there are any such statistics available that could be acquired? There would have to be some original study?

Mr. LEVIN. An original inquiry.

Senator HEFLIN. Well, it would be interesting. The conflicts alone are not—if you had no conflicts you would still have ample reason, in my judgment, for these matters to be—for a National Court of Appeals. In regard to your issue pertaining to panels, I think if you go back to some of the studies, even into Roscoe Pound's speech on dissatisfaction of the public with the administration of justice, one thing that he points out is the lack of mobility of judges from a viewpoint horizontally and vertically.

A great number of studies have been made pertaining to this. There have been some criticisms. It has worked favorably in a number of State courts, by which you would have vertical transfer of judges, that is, taking a judge from a lower court. You have maybe had some criticisms of certain types of cases within the Federal jurisdiction, of using of district court judges on circuit courts.

Of course, volume has always been a primary reason for having lower panels and for having the use of bringing judges up to sit on such cases. Now it could well be that the volume of cases originally in a National Court of Appeals would be such that there would not be that but if litigation continues to grow, either some flexibility or some mobility of judge power as opposed to this disadvantage that has been mentioned, the collegial aspects, which sometimes are good—and there are many critics of the idea there is too much buddy-buddy at the appellate court: "If you concur in my opinion, I do not dissent in yours."

I do not want to accuse anybody of any of that but there has been an observation by some people that that does exist and there is somehow or other among appellate judges a feeling that their prepared opinion is going down in the annals of the literature of jurisprudence as being some superb work. Unfortunately, I do not think there are too many people that read the opinions later on. I see Judge Hufstедler is sort of having a chuckle about this.

Ms. HUFSTEDLER. Mr. Chairman, my chuckle was that there were times on the bench when it would have been awfully nice to have had a horse trade if I had had a horse. [Laughter.]

Senator HEFLIN. Well, there may be different observations at different places. Maybe there are some of us that are a little more suspicious than others of our evaluations of fellow jurists. Of course, this is a matter just getting started, as to whether or not to have panels.

Because of tremendous volumes, State courts have worked in divisions in some places where you would have nine that sit basically in panels of five. It places a tremendous burden on the chief justice in particular to keep conflicts from existing between the divisions as they would come up. To some degree, though, a great deal of that could be supplied by a staff if it is properly organized in such a manner.

I point out that largely I think the provision dealing with panels and the discretion of the court, as I would use, it was that you could be faced with a tremendous workload. However, that is something that if it were to develop that there was a rationale for it that was sufficient to overcome the objections, it could of course be added later if there is a need for that.

Mr. LEVIN. Mr. Chairman, may I just underscore a point made by the chairman a moment ago that even in cases in which no conflict ever emerges, we have traced instances where the effort by parties to make a conflict—whether it be by the Government or by a taxpayer or in some other form of litigation—has created problems. Not knowing, the uncertainty as long as over 10 years as to whether there will be a conflict created, in itself is part of the penalty of inadequate capacity for national clarity in the law.

Senator HEFLIN. Well, let me get down to some basic questions. Of course, the Freund proposal and the Hruska Commission had two different approaches. As it has been referred to, the Freund proposal was the entry court and the Hruska was an exit court. In other words, the Freund would determine, screen beforehand what the U.S. Supreme Court—it ran into a lot of opposition as a result of that.

The Hruska Commission came forth with a different one, that the U.S. Supreme Court would determine in effect the docket of a National Court of Appeals, dividing it into two categories; one a category by which it directed the National Court to make decisions, and a second group in which it said in effect: "You will have the discretion as to whether or not you want to do it by filed opinion or whether or not you want to grant cert, to have discretion within it."

Is there any difference in the feeling among the three of you as to whether or not the Freund or the Hruska approach is preferable?

Ms. HUFSTEDLER. I certainly do not have any doubt at all. The Hruska approach is the solid approach. Of course, in fairness to the Freund report, the Commission was not asked to specifically address increases in the decisional capacity of the Court. The Commission was asked to address a very different question, which was: How do you cut down the staggering volume of the papers that

reach the Supreme Court of the United States? That is not the question that the Hruska Commission addressed.

When one identifies the problem—and I think very correctly—as one of the decisional capacity for expounding nationally binding decisions on national law, I think one can do nothing other than to decide that the Hruska Commission reached the correct formulation. After all, we have differed one with the other in all of these proposals in some of the design details, but I think I have no hesitancy at all in saying that for those who have considered the problem carefully over a period of years, the concept developed by the Hruska Commission is a sound concept.

Mr. HRUSKA. Mr. Chairman, it is some years since we wrote the report and deliberated on its content and its substance. My recollection, however—it will bear verification—but my recollection is, the Commission did not consider too long nor too concernedly the Freund report. The basis of that, as I remember, the essence of it is simply this: that the Supreme Court loses its supremacy if there is going to be a restriction and a limitation put on its ability to set its own docket. It could not set its own docket if the group designated by the Freund report said, "You shall consider these cases out of 1,000 cases." Then it is no longer supreme; it is subject to the judgment of a body external to its own organization, and therein lies the great obstacle to serious, sustained consideration of the Freund report.

Perhaps Professor Levin's memory stretches beyond that, but that is my recollection, Professor.

Mr. LEVIN. I am in basic agreement with both of the preceding speakers.

Senator HEFLIN. In the event that a bill now pending before Congress does not pass—that is that which would eliminate mandatory, obligatory jurisdiction of the Supreme Court in certain cases—do you have any feelings that this should not be discretionary with the U.S. Supreme Court as to whether or not to refer it to a National Court of Appeals?

Mr. LEVIN. Mr. Chairman, basically I strongly support the bill to eliminate mandatory appellate jurisdiction. I do not think it will give the Court much relief because they already have gone to these various summary procedures, which have been discussed to handle many appeals. However, I would like to suggest that the problem of the Court's own discretion or mandatory jurisdiction in that context is rather different than the kind of thing we are talking about here.

Even if that failed of passage, I do not think it should at all argue against giving the Court the kind of discretion envisioned in the bill that is under discussion here. If anything, it would make the need even greater to give the Court some kind of escape valve and yet allow for a decision on a national basis.

Senator HEFLIN. There have been a number of suggestions for specialized courts. There has been a suggestion for legislation creating a National Court of Tax Appeals which in effect would take away from the circuits. There has been a lot of opposition saying that they should be there. I think Chief Justice Cameron, who is here, in order to try to reach some sort of finality in the area of post-conviction relief in criminal matters has advocated a National

Court of Appeals of the State courts. There is now pending before Congress a bill which would have a new approach dealing with patents, customs, and other matters.

Could this National Court of Appeals in effect consolidate and prevent that type of a fragmentation of your Federal judicial system? Do you have any thoughts on that?

Mr. LEVIN. Mr. Chairman, I would like to distinguish between a number of the different proposals that you have put forth. In general terms the topic of specialized courts was a matter the Hruska Commission considered and although there has been some change in the thinking of some people on that issue, the need for added capacity for appellate resolution of legal issues is found in so many cases involving varied subject matter that this approach embodied in the bill that is before us today is far preferable and avoids a lot of the risks of that specialized kind of court.

I will let Judge Hufstedler speak to the differences of a court of administrative review and its relationship to this because she has spoken on that publicly.

I would only say that the patent area is a very different, in my judgment a very different kind of area because it needs a tremendous amount of appellate review based on specific fact situations, because there is general agreement on the general principles and it is a problem of their application. I do not view that particular bill as involving a specialized court in terms of its caseload mix, the combination of two present courts and its mix. Therefore, I view that as sort of a discrete kind of question.

I do not think that any of the proposals argue against the need, fully described in the introductory statement to these hearings, for a National Court of Appeals.

Mr. HRUSKA. I want to say I subscribe to that general view. The proposal, as I understand it, in the joinder of those two courts will not result in that type of single-issue court—what do they call them?—the specialized court. There is a broader jurisdiction and it does include a greater field than only one specialty.

Ms. HUFSTEDLER. I simply second the views expressed by my colleagues on the panel, Mr. Chairman. Although I have never had overwhelmingly strong feelings about a specialized court for patent appeals—we already have one, and in effect it is a question of broadening the jurisdiction of that court—I would be remiss if I did not point out that the American Bar Association has consistently taken a position against specialized courts, as you are well aware, other than those that already exist.

I know of nothing in the history of the American Bar Association that has tried to go athwart the existence of those specialized courts that now exist, whether they are administrative law tribunals or whether they are tax cases or patent cases. Rather, the focus is on the specialized court when it comes to the appellate review structure, for reasons that are many, most importantly, two: One, constitutional and other sorts of questions cannot be excluded from the specialized courts because they intervene and interleave many of these issues. Second, sitting upon a specialized court, unless the person is most extraordinary, does not tend to lead to the broadest vision across all the areas of law which may be impacted by a decision in a particular case.

For that reason, I think it would be unwise to build a structure of specialized courts or to point a National Court of Appeals to jurisdictional limitations that would embrace one of those subjects. My very distinguished friend, Judge Henry Friendly, has taken a very different view and he defends it with great style, as always. It is just that when he reaches the conclusion, I must say I do not agree with him.

Senator HEFLIN. Well, of course, if you have a Court of Patent Appeals I think you would have to define how it ties into a National Court of Appeals. One of the criticisms of the consolidated Court of Patent Appeals is that it can bring with it jurisdiction of other issues such as antitrust, and you would end up in a patent court with really an antitrust case that ought to be litigated in another forum. There are criticisms of that.

If a National Court of Appeals is created, I think we would have to give a lot of serious thought to how you would tie these new patent appeals and Customs appeals courts to it. It is something I think we would just have to give some thought to as we meet.

I have unduly asked a lot of questions. I am, of course, naturally interested in this, and having such a distinguished panel as this gives me an opportunity to hear your responses. I think that rarely has anybody in Congress had such a distinguished group.

We are pleased that Mr. Pete Velde, who was the Administrator of the LEAA for a long time and at one time was on Senator Hruska's staff, is here. He is the chief counsel for the majority, representing the chairman of this subcommittee, Senator Dole, who happens to be the busiest Senator in all of Congress today. I think that with his tax legislation, farm legislation and everything else that requires his time, how he has been able to spend as much time as he has in the Subcommittee on Courts is largely due to his very efficient and effective administrative aide here.

Mr. Velde, if you would like to ask some questions of this panel, we would be delighted for you to do so.

Mr. VELDE. Thank you, Mr. Chairman. You are very generous this morning.

I must say I am sitting here mentally listening to Senator Hruska's testimony and thinking that I should be making corrections or changes in the transcript.

REACTION TO HRUSKA COMMISSION PROPOSAL

Just two questions: First, Professor Levin, the main recommendation of the Hruska Commission has now been out on the table for several years. There has been time for the legal fraternity and particularly the scholars in the field to review it and criticize it and digest it. Has the crucible of legal commentary now arrived at a consensus that is for or against, or what is the situation among your peers in academia?

Mr. LEVIN. I do not think there is a consensus; I think there is a division. I would say that before the commission made its report a colleague of mine from a different university said to me that he thought the time was coming, and he would expect that a proposal of some type for a new court would be enacted fairly promptly.

I said to him, "Come on, you know, I am a little surprised." He really was very serious. He was not kidding, and he meant in about a decade whereas normally such a change would take 40, 50 years or longer. Therefore, I guess academe moves slowly and structural revision of the Federal judicial system moves slowly. I do not think we have yet achieved a consensus. I think there is a growing awareness that we do have something of a problem and better be concerned.

INTERCIRCUIT PANELS

Mr. VELDE. Senator Hruska, a bill has been introduced in the House of Representatives—there is no Senate companion bill so far—but there is serious consideration being given to the idea of conferring authority on a chief justice to convene intercircuit, if you will, ad hoc panels to consider intercircuit disputes. I think that proposal is probably encompassed within the confines of S. 1529, but there has been concern expressed about creating a new court with the attendant costs and new judgeships and clerkships and so on, whereas at least some of the burden which now is placed on the shoulders of the Supreme Court might be shifted off to these ad hoc panels.

Do you see any merit in that proposal? Is the proposal mutually exclusive of this proposal for the new National Court of Appeals, or could they both proceed?

Mr. HRUSKA. Well, first I might observe that to create an entity, a judicial entity which would concern itself with intercircuit conflict, would be a fragmentary approach. It is a factor in the formation of the Commission's thinking and its conclusions but even if the intercircuit conflicts were eliminated from it, the need for a body such as that of the National Court of Appeals would still persist, so it would be a fragmentary treatment of a much broader, fundamental problem.

The idea, however, of an intercircuit—I am not too familiar with details but as I recall them, the intercircuit court of appeals would be more or less on an ad hoc basis and there would be a squad system, as we know it in the football science and art, where a squad would be formulated and sent in to deal with either a given number of intercircuit conflicts or to create a list and then deal with them. That might be the cause of some difficulty because there would be no institutional policy that would develop, no institutional treatment of the problem, and it would lack that interrelationship with other fields of the law and with other operations in the judicial system, to wit, even the Supreme Court.

Might not an ad hoc committee of that kind introduce even more confusion into the picture because it would not be in harmony with, it would not comport with the doctrinal policy adopted by the Supreme Court? Therefore, there are some questions that immediately come to mind. I would have to study the entire bill and the fashion in which it is done.

I would prefer to think that perhaps something could be done by way of preserving the broad scope approach of a National Court of Appeals, whatever its form. Perhaps some common ground can be developed where the features of each of these can be accommodat-

ed to some degree but nevertheless have certain essential principles inhere in that ultimate product.

Ms. HUFSTEDLER. If I may add briefly to that commentary, Mr. Chairman, it is possible to have a compromise position. I thoroughly agree with Senator Hruska's objection to having simply an ad hoc set of panelists. I think that will not work.

However, what has been considered on other occasions in terms of the design features of the National Court of Appeals is to have members who are presently on the court of appeals be assigned in a permanent way to the new court, on various kinds of staggered terms, that is, and after they finish their service they return to the courts from which they came, at the same time, however, creating new circuit judgeships to take the places of those who have been on that assignment.

However, apart from the bill that Mr. Kastenmeier has introduced, I have never seen anyone endorse the idea of having, one, an ad hoc panel nor, two, a panel that is entirely selected by the Chief Justice of the United States. I think that could create some very difficult problems for the Chief Justice and for the court itself. However, if the members of the court were selected by a combination of the Senate, the Chief Justice, or using a commission system, any one of those might resolve that issue.

The feature that does have some degree of desirability in the Kastenmeier report, if one uses sitting judges on long-term assignment—that is, they will never sit again, there is nothing ad hoc about it, they sit there for years—there is a possibility if one does not like the results to dismantle such a court without bending the Federal judiciary in any way out of shape. I myself do not favor that but I say it is a possibility.

However, I strongly endorse the commentary by Senator Hruska that it is not a solid way to build this court to have it on simply rotating panels. The coherence and the stability which the design is intended to create would not exist in that kind of construction.

Mr. VELDE. One more question, Mr. Chairman: An alternative approach to dealing with the problem that has been so well documented here today would be to limit the jurisdiction of the Supreme Court in various ways. There are proposals pending in the Congress to achieve that end.

I know the ABA has had long and strongly held views on this subject. I wonder, Judge, whether you might just briefly restate the position.

Ms. HUFSTEDLER. I have testified at some length adversely to the provisions of some 20 bills pending before Congress on the reduction of jurisdiction of the Supreme Court of the United States, the lower Federal courts, or both, on the basis both that they are unwise as well as unconstitutional.

However, leaving aside that issue, it does not seem to me that any of those proposals would do more than make the present situation worse. Leaving apart the constitutional issues with respect to reduction of the jurisdiction of the U.S. Supreme Court in constitutional areas—again, very dubious under constitutional precepts—the elimination of lower court Federal jurisdiction to undertake such issues as religion, procreation, and race, would thrust all of that litigation into the State court systems. Assuming access to the

Supreme Court of the United States was not eliminated, the end product would be to exacerbate the already very severe problems that the Supreme Court now has.

What one does is to keep all of those issues churning in 50 jurisdictions all the time. I cannot imagine a situation which would create worse pressures on the stability and predictability of the national law than that kind of a proposal. Contrary to eliminating conflicts, it increases conflicts because you not only have inter-circuit conflict, you have conflict on major constitutional issues that can never be effectively laid to rest among all 50 of the State court systems.

No matter now strongly the proponents may feel about the correctness of the decisions reached by the U.S. Supreme Court in these areas, none of them in my view warrant this kind of drastic change in notions of separation of powers, Federal supremacy, and for that matter orderly administration of justice in the United States.

Mr. VELDE. Thank you, Mr. Chairman.

Mr. HRUSKA. Gentlemen, I would like to comment only briefly on that, inasmuch as my good friend Mr. Velde directed the question pretty much in my direction.

My first exposure to an effort to limit the jurisdiction of the Supreme Court came about some 22 years ago. My recollection is it was in 1958, when one of the burning issues then was communism that was running rampant, and so wickedly and so disastrously, within the internal areas of the zone of Interior. That furnishes for me an opportunity to point out that most of these proposals, most of these proposals to limit the jurisdiction of the Supreme Court are pretty much by what is commonly known and for want of a better term, we could call single-issue people, single-issue movements, single-issue sentiment.

It would come to a bad pass, it seems to me, if we were to try to manipulate the judicial system of this country to accommodate any narrow construction, any narrow operation of the Nation's business and of its society. That is separate and apart from the constitutional questions because that is an area of its own, and I would have serious doubts that any limitation of the operation of the Supreme Court would stand up against many of the arguments which are inherent in the constitutional situation.

Senator HEFLIN. Thank you. I will refrain from getting into the ad hoc, inter-circuit panels at this time because I really think that it is going to be necessary to fully explore all of this at a different hearing. I think we are going to have to have several hearings on this issue. We have taken a great deal of time this morning but I think it has been exceptionally excellent testimony and responses. Certainly we are delighted to have had the witnesses before us.

I think there are some discussions, there are some matters—I know I have given thought and have even drafted some things that might have some sort of a different approach on this. I agree that there are some real problems.

At a Brookings Institution gathering of the House Judiciary and the Senate Judiciary Committees, Judge Clifford Wallace of the ninth circuit, who had done a lot of work, and myself both expressed the idea we do not want to end up creating a lean-to to the

judicial structure. We want to try to do something that can solve the problem. At the same time there are real considerations of cost, buildings, law clerks, other things that Mr. Velde has brought out. Therefore, I think this is going to be something we are going to have to get into fully as we go along and proceed in this.

Let me thank each of you for being here. Your testimony and your wisdom has been exceptionally beneficial, and I appreciate it.

Mr. LEVIN. Thank you, Mr. Chairman.

Mr. HRUSKA. Thank you, Mr. Chairman.

[The prepared statements of Mr. Hruska, Ms. Hufstedler (with additional submissions), and Mr. Levin follow:]

PREPARED STATEMENT OF ROMAN L. HRUSKA

My interest in the subject bill stems from two principal sources: (1) My tenure as a member of this Senate Committee on the Judiciary with the years of study and participation in its assigned tasks of oversight and legislation relating to the federal judicial system; and (2) my membership and activity as a member (and Chairman) of the COMMISSION ON REVISION OF THE FEDERAL COURT APPELATE SYSTEM, from the time of its creation in 1972 to the filing of its Final Report in June 1975.

The very first sentence of the Report's text starts out: "1. The Commission recommends that Congress establish a national Court of Appeals ... " That Report was referred by the Commission to the Office of Legislative Counsel with the request and instructions that draft legislation be prepared reflecting and implementing the Commission's report and recommendations on this subject.

Subsequently (December, 1975 and May, 1976) two bills were introduced in the Senate. The first (S. 2762, 94th Congress) consisted of the product of the Office of Legislative Counsel. It was introduced by this witness for himself and Mr. McClellan (of Arkansas), Mr. Burdick (of North Dakota) and Mr. Fong (of Hawaii), all of whom served as Senate members on the Commission on Revision.

As to jurisdiction of the Court it proposed, the first bill provided two sources for cases for consideration: (1) "reference jurisdiction" meaning cases assigned to it by the Supreme Court; and (2) "transfer jurisdiction" meaning cases transferred to it from other federal appellate courts.

The second bill (S. 3423, 94th Congress) was introduced by this witness. It differed from the first bill in that it eliminated the "transfer jurisdiction" and provided only for

"reference jurisdiction." It differed also by providing for selection of judges for the proposed court in such fashion as to avoid any one President's selection and appointment of all the judges at the outset of the new Court's existence.

Thus there were formally presented to the Congress for the first time specific, concrete proposals dealing with an increasingly evident and very serious problem in the Federal court system; namely, the insufficiency of final judicial review. Or, to put it in another way - the inadequacy of final appellate capacity of the nation's judicial system.

The subject bill, S. 1529, has the same declared purpose as the two bills already referred to, namely "To establish a National Court of Appeals..."

THE URGENT NEED FOR INCREASED FINAL APPELLATE CAPACITY

In his senate floor statement on the occasion of introducing the Bill, the Senator from Alabama stated:

"During the last term, the Supreme Court received 4242 petitions for writ of certiorari. It granted 289, less than 7%. 147 of those granted were summarily decided and only 182 were scheduled for oral argument. During the previous term, only 6.25% of the petitions were granted. Clearly more than 6 or 7% deserve to be heard, but our highest Court has no choice..."

JUDGE SHIRLEY HUFSTEDLER then of the ninth Circuit, testified in a similar vein on May 19, 1976 in hearings of the Senate Judiciary Committee. She observed that the Supreme Court "now hears fewer than one per cent of the cases decided by the courts of appeals." She went on to say that Court of Appeals "can neither be right nor harmonious 99% of the time. One per cent supervision is patently inadequate."

The Supreme Court, as the Senator from Alabama rightly observes, has no choice. It is functioning at full capacity now and has been doing so for many years. It can only

accommodate each year a constant number of cases, having due regard for the quality of its product.

But the number of filings continues to grow. The scope and the complexity of issues of national importance is continually widening. The need for increasing final judicial review capacity was imperative six years ago, when the Commission on Revision of the Federal Court Appellate System filed its Final Report. (June 1975). It is even more compelling now.

That Report, Mr. Chairman, is authoritative and reliably documented. It is earnestly recommended for studious reading. In college it would be classified as "required" reading. It is even more important in Congress for all of its members. Here are a few highlights taken from it:

Ervin N. Griswold, former Solicitor General and long-time Dean of Harvard Law school testified in Senate Sub-Committee hearings. He referred to a lecture he had given in 1974, in which he focused on the 1973 Term of the Supreme Court, in which he stated that the Court was hearing "about 150 cases on the merits in 1925; it was hearing about 150 cases on the merits 25 years ago. It hears about 150 cases on the merits today." (1974). Note that in 1951 about 1,200 cases were filed in the Court. Twenty years later there were about 3,600. (Presently there are over 4,000). His further comments in the lecture included this:

"Putting it another way, about 18% of the paid cases (appeals and certiorari) were heard on the merits twenty years ago, while about 6% of paid cases were heard on the merits during the 1973 Term. What became of the 12% of paid cases? . . . they were lost in the 1973 Term simply because of the inadequate appellate capacity to hear cases on a national basis."

The views of Justices of the Supreme Court are expressed in letters addressed to the Commission in 1975. They are found in full text in the Appendix of the Commission's Final Report. That report includes this excerpt:

THE EXPERIENCE OF PARTICIPANTS IN THE SYSTEM

The perceptions of participants in the federal judicial system are valuable in assessing the extent to which the present structure of the federal courts is adequate to meet the needs of the country. Particularly significant are the views of the Justices of the Supreme Court of the United States.

Mr. Justice White is convinced that there are cases "which should be decided after plenary consideration but which the Supreme Court now either declines to review or resolves summarily," and that they exist in substantial numbers, sufficient "to warrant the creation of another appellate court." After expressing agreement with Mr. Justice White, Mr. Justice Powell adds:

[T]he burgeoning caseload of the federal courts is not likely to diminish, and this Court can hardly serve the national appellate needs of our country as adequately today as it could when petitions filed here were about 1,000 per year as contrasted with the present 4,000 plus.

Mr. Justice Blackmun has put the matter in another way. He refers to the cases "that almost assuredly would have been taken twenty years ago," but which are now denied review, and to the "worry" occasioned the Justices themselves by the need to deny. The concerns expressed by Justice White, Justice Powell, and Justice Blackmun are elaborated by Mr. Justice Rehnquist:

"Conflicting views on questions of federal law remain unresolved because of the Supreme Court's unwillingness, which is reflected in the exercise of its discretionary jurisdiction each year, to undertake to decide more than about 150 cases on the merits during each Term. This reluctance reflects the institutional view that thorough and deliberative decision-making, and not quantity of output, is the Court's primary consideration. A generation ago, when I was a law clerk to Justice Jackson, this order of priorities imposed no hardship to litigants. The Supreme Court's capacity to decide important issues of federal constitutional and statutory law was adequate for the needs of the country.

"I think the Commission's report documents the case that the capacity of this Court is no longer adequate for that purpose. While the number of unresolved conflicts between courts of appeals which were not resolved by this Court is not numerically large, it is significant and, I think everyone would agree that it is bound to increase. Congressional action that would constrict this Court's appellate jurisdiction and thereby increase our ability to resolve direct conflicts through exercise of our discretionary jurisdiction would affect only the immediacy of the need for a national court of appeals, and not the ultimate need for expanded capacity.

A somewhat different problem is underscored by the Chief Justice:

[O]ne element of the Court's historic function is to give binding resolution to important questions of national law. Under present conditions, filings have almost tripled in the past 20 years; even assuming that levels off, the quality of the Court's work will be eroded over a period of time.

The risk of an erosion of quality must be of particular concern at a time when the importance of the issues presented to the Supreme Court is undiminished and the volume increased. As the Chief Justice states:

"The changes brought on in the 20th century and the new social, political, and economic developments have surely not diminished the importance of the questions presented to the Supreme Court and have vastly increased the volume of important questions which can have an impact of great significance on the country."

The Chief Justice "conclude[s] by saying that if no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation of an intermediate appellate court in some form will be imperative."

"Relief" for Supreme Court Workload:

Justice Rehnquist dealt with the point made by some critics of a National Court of Appeals, that such a Court would not relieve the Supreme Court of its present heavy burden. Such criticism is sorely misplaced because the focus of the problem is not the burden on the Supreme Court. The focus has rather been to determine whether the need for definitive declaration of national law in all its facets is being met. And if not, how it can best be met.

On this point, Justice Rehnquist put it this way in his letter to the Commission:

I agree with the Commission's view that the desirability of a national court of appeals turns not on the workload of the Supreme Court but rather on the sufficiency of judicial capacity within the federal system to review issues of federal constitutional and statutory law. While the adoption of the Commission's proposal might enable the Supreme Court to make some changes in the way it exercises its discretionary jurisdiction, the principal objective of the proposal is not "relief" for the Supreme Court but "relief" for litigants who are left at sea by conflicting decisions on questions of federal law.

Consequences of Inadequate Capacity

The Commission on revision concluded that four major

consequences resulted from inability of the federal judicial system to provide adequate capacity to declare national law.

In reality, each of the four are but a different facet of the same phenomenon: unnecessary and undesirable uncertainty. The four are: a) unresolved inter-circuit conflict; b) delay; c) a burden on the Supreme Court to hear cases arising from inter-circuit conflict otherwise less worthy than many cases which are denied review; and d) resulting uncertainty of the law.

Theory of "Percolation"

It is argued that there are some issues as to which "successive considerations by several courts, each re-evaluating and building upon the preceding decisions" will improve quality of adjudication.

This is called "percolation." There may be reason to avoid premature adjudication. The Supreme Court, however, presently possesses the power to control "percolation" in appropriate instances. That power will continue to reside in the Supreme Court under the proposed bill. No change is wrought in this regard.

But the cases which result in objectionable delay are those to which, to borrow Dean Irwin Griswald's words, "the gain from maturation of thought from letting the matter simmer for a while is not nearly as great as the harm which comes from years of uncertainty."

There is no value, in fact there is much harm, in a system which fosters prolonged uncertainty and delay because the design of the system cannot accommodate more rapid solutions where they are needed.

As to inter-circuit conflicts: Rule 19 of the Supreme Court lists as one of the principal factors in determining whether certiorari should be granted is whether the decision below conflicts with another decision. This is considered an

important reason for granting plenary review.

The result is that, each year, the Justices hear and consider a number of cases which, in terms of their intrinsic importance, might well be thought unworthy of the time and effort of the Court.

As long as the Court remains the only tribunal empowered to resolve conflicts, no one would fault it for granting review solely for that purpose. The question is whether, because of other demands placed upon the Court, and considering interests of the system as a whole, some issues might better be decided by another tribunal empowered to hand down decisions as precedents of national effect; subject of course to petition for a writ as provided in the proposed bill.

The Commission recommended such a procedure. The bill's introducer approves it. It is hoped the committee and the Congress will do likewise.

BROWN TRANSPORT CASE

Further material as to conflicts which is highly noteworthy is found in Justice White's dissent from the denial of certiorari in Brown Transport Corp. v. Atcon (77-1581). The petition was denied in September 1978.

The views of Justice White and of the Chief Justice are found in the United States Law Week (47 LW 3387), December 5, 1978 issue.

Justice White recited a long list of cases which under Rule 19 should be granted certiorari because they constitute conflicts. He also reviewed the history of the phenomenon of lack of capacity for final judicial review. He referred to the Commission on Revision recommendation for creation of a National Court of Appeals; and the fact that legislation was proposed. His concluding sentence was

"The Bill did not proceed beyond the hearing stage."

The Chief Justice in his views on the Brown Transport case, set out a more comprehensive historical background. it included references to the Freund Study Group, the Commission on Revision, and the 95th Congress creating 152 additional judgeships.

The final paragraph written by the Chief Justice:

The additional judgeships may solve short term problems, but the long term problems of the Supreme Court analyzed by the Freund Committee and the Commission on Revision of the Federal Court Appellate System remain as they were a decade ago. If the improvement in the expeditious dispensation of justice intended by the Congress and the President when they authorized 152 new federal judges is to be realized, these problems should be faced without waiting for a crisis.

Frankly, Mr. Chairman, the concept of a National Court of Appeals has "percolated" long enough. It is time for Congress to act.

S. 1529

MR. CHAIRMAN, The Senator from Alabama and this Sub-Committee are to be commended for pursuing their goal of a National Court of Appeals.

It is a concept whose time is here. In fact its approval is over-due.

It is hoped that continued progress will result in agreement on a measure that will effectively increase the final appellate capacity of the federal court system. And in a fashion that will improve the workings of that entire system. A seasoned resulting product should be enacted without further delay.

As my contribution to the seasoning of this Bill, two suggestions are submitted. It is with due respect to the introducer of the bill and in a constructive, helpful spirit that I do so. These suggestions are on: Section 21 (b), assignment of circuit court judges to the National Court on a temporary basis; and Section 27(b) which allows the National Court to sit in separate panels.

SEC. 21(b) - ASSIGNMENT OF JUDGES ON TEMPORARY BASIS

Under this section the Chief Justice upon request of the National Court's

chief judge, may "assign judges from circuit courts of appeal on a temporary basis to sit and act. . . ." set.

The purpose and reason for this section are not clear to this witness.

The Commission considered a wide variety of alternative proposals for selection and tenure of judges. Its Report (page 30), reads as follows:

"The function of the court is such as to require continuity and stability in its membership and a process of selection designed to achieve the highest level of quality in its incumbents."

In regard to temporary assignments, the Report (page 31) reads:

"Temporary service on a rotating basis by federal appellate judges sitting on assignment from their respective courts, would, in the Commission's view, be even more undesirable.

A court so composed would lack the stability and continuity that are essential to the development of national law."

It is well to bear in mind that it is national law the court will formulate. Stability and continuity are important indeed . . . doctrinal policy and policy continuity.

Other desirable characteristics in this regard include: consistency of general approach; a current, intimate knowledge of the areas of the Supreme Court's retention and concern of cases on its own docket (in order to avoid duplication or conflict with cases chosen by the National Court from the list of referred cases); development of a spirit of the collegial among the constant members of the Court.

Occasional visiting colleagues from the outside on a temporary basis however able and talented, might tend to an adverse or disruptive influence.

In the absence of a showing of useful purpose, Section 21 (b) could well be dispensed with.

SECTION 27 (b) JUDGES SITTING IN PANELS

This section reads: "The court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three, five, seven, or nine judges as the court determines. . . ."

This Section should be thoroughly examined and re-considered. In my opinion it is unwise in its present form.

Cases referred to the National Court and heard by it are of like importance, nature and quality as those retained and acted upon by the Supreme Court. But for the fact that time resources do not permit, the Supreme Court would hear and determine them.

The National Court should accord these referred cases such processing in manner and execution as will be as nearly as possible comparable to the standards and quality which the Supreme Court applies to its work. Assignment of cases to panels of the National Court would fail in this regard.

The virtues of the existing system must not be compromised.

It is imperative that the National Court produce the best possible results. It must do so to enable it to earn and maintain respect which it must command to secure acceptance and confidence as a useful entity in the Federal Court system.

Functioning by panels would tend to impair and even forfeit acceptance and confidence.

The Supreme Court does not use panels. It is not only Constitutional restraint which impel it to sit only en banc. In his letter (May 29, 1975, full text to be found in Report's Appendix) to the Commission, the Chief Justice wrote:

"It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels, but such proposals would meet with almost universal opposition, even assuming their constitutionality."

The aversion to panels or divisions in the Supreme Court should apply with full force in the National Court structure.

In all fairness to the Supreme Court, which can be called upon to review National Court decisions, the latter Court should always sit en banc. This would assure quality results of the highest degree, - - - thus warranting confidence and acceptance by the Supreme Court. Decisions by panels would not suffice for that purpose.

As to requests to the Supreme Court for review of National Court decisions, the Commission on Revision stated in its Report (page 39) :

"We anticipate, however, that few decisions of the National Court in cases which came to it from the Supreme Court would be reviewed thereafter by the Supreme Court. . . ."

In all good faith and toward reaching the goal that such anticipation will materialize, the National Court should always sit en banc.

S U M M A R Y

MR. CHAIRMAN, a Bill "to establish a National Court of Appeals...." in its final form would yield many benefits and far-reaching wholesome impact on the Federal Court System.

It would have ability to decide at least 150 cases on the merits each year. This would double the final appellate capacity of the nation's judicial system.

These 150 decisions would be final, and binding on all courts of the United States, and in applicable cases on all courts of the land, unless modified or over ruled by the Supreme Court. It is anticipated that such modification or reversal would occur only in the rarest instances. It is expected that once the Supreme Court assigned a case to the National Court, it would abide by the result. Hence, it cannot be reasonably argued that there would be added a fourth tier of courts to the federal system.

The new Court would not impose any unduly prolonged process. There would be no occasion for litigation over jurisdiction. It would give issues of national importance expedited resolution. The cost of litigation in terms of time and money would be reduced over all. The incidence of purposeless and voluminous re-litigation would be lessened.

The virtues of the existing system would not be compromised. In fact they would be enhanced.

There would be no interference with or usurpation of the powers of the one Supreme Court required by the Constitution. The Supreme Court would be given added discretion to lighten its burdens. There would be an easing of the concern and anxiety of its members about the ever increasing unmet needs for additional final appellate adjudication of cases.

The new Court would be empowered to resolve conflicting decisions among the circuits in such cases as the Supreme Court refers to it. If such reference is made, it can be assumed that the Supreme Court gave due consideration as to the sufficiency of "percolation" through the circuits.

But the proposed Court's functions would not be limited to conflict situations alone. It would be highly fruitful in providing authoritative and timely determinations of recurring issues before a conflict had ever arisen.

The net effect of the proposed Court would be to bring greater clarity, stability, and uniformity to national law.

PREPARED STATEMENT OF SHIRLEY M. HUFSTEDLER

Mr. Chairman and Members of the Subcommittee:

I am Shirley M. Hufstедler, appearing for the American Bar Association at the request of the President of the Association, Mr. David R. Brink of Minneapolis, in support of S.1529, Senator Heflin's bill to create a National Court of Appeals.

Presently I am a partner in the Los Angeles law firm of Hufstедler, Miller, Carlson & Beardsley. From December, 1979 to January 1981, I was a member of the Cabinet of the President of the United States as Secretary of Education. Prior to that, from 1968 to the time of my appointment as Secretary of Education, I was a judge of the United States Court of Appeals for the 9th Circuit. Before that, from 1961 to 1968, I was successively a judge of the Los Angeles County Superior Court and Associate Justice of the California Court of Appeals. Before my service on the bench, I was Special Legal Consultant to the Attorney General of California, preceded by a decade of private law practice in the litigation field.

For more than 15 years, I have been actively engaged in judicial reform, with special emphasis on the restructuring of state and Federal appellate systems. During many of those years I have worked with outstanding members of the bench and bar to develop a National Court of Appeals, both as a member of the American Bar Association Special Committee on Coordination of Federal Judicial Improvements and as a member of the Advisory Council on Appellate Justice. In those roles, I have been privileged to testify before this distinguished Subcommittee, the Hruska Commission on Revision of the Federal Court Appellate System, and the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice.

It is both a privilege and a pleasure to testify again before this Subcommittee in support of the National Court of Appeals.

The creation of the National Court of Appeals is a necessary step in alleviating the intolerable burden on the Federal appellate system. The existing structure does not have the decisional capacity to maintain stability, harmony and predictability of the national law. Without that capacity, both public and private decision-making is adversely affected and the resulting uncertainties breed excessive litigation that further burdens the judicial process and individual litigants.

The United States Supreme Court is the only court in the country that is now empowered to pronounce national law that binds the whole Federal judiciary. The caseload in the Supreme Court has risen dramatically because litigation has risen dramatically at every level of the Federal system. The decisional capacity of the court has not increased, and cannot be significantly increased without very seriously impairing its role.

For many years the Supreme Court has been unable to give plenary attention to no more than 175 cases per year, and usually the figure is closer to 150 cases per year. The percentage of cases reviewed on the merits has been declining steadily over the last 20 years as the volume of litigation has been increasing. The diminution of the proportion of nonconstitutional cases heard by the Supreme Court over the last 20 years is a symptom of the court's lack of decisional capacity to review all of the cases from lower courts that deserve national decision. The justices themselves have repeatedly commented in noted dissents from denial of certiorari about the need for definitive decisions on national law issues upon which lower court authority was in conflict. Yet, the court cannot make room on the docket for all of these cases that would clearly have been heard in an earlier day when litigation pressures were more manageable.

The inability of the Supreme Court to hear all of the nonconstitutional cases that need to be decided to maintain reasonable stability and predictability as to national law has been evidenced for almost a decade. But the pressures have been growing more rapidly in recent years, partly because both the number of Federal judges and the number of Federal courts have grown. The creation of new judgeships -- adding Article I and Article III judges -- and expansion of the jurisdiction of Federal magistrates together with the creation of the new bankruptcy courts, plus the division of the Fifth Circuit, have been responses to the need to expand the capacity of the lower Federal courts to handle increasing caseloads. Expansion of the decisional capacity of the lower courts in the Federal system was and is essential. However, the increase in that capacity has also greatly increased the incidence of disharmony in the national law -- an inevitable by-product of increasing the number of decision-makers. Nothing has been or can be done to alleviate that distress without creating a court that can handle the overflow from the Supreme Court.

S.1529 responds to the national needs without impairing the power of the Supreme Court to control its own docket, without unduly elongating or prolonging the appellate process, and without diluting the necessary powers of the lower Federal courts. The benefits will extend not only to litigants who must bear the cost of delay and uncertainty, but also to all members of the public whose ability rationally to plan public and private action is adversely affected by the lack of predictability in the national law. An incidental benefit will be the decrease in litigation of churning issues of national law that now unnecessarily add to the congestion of lower court dockets.

Enactment of S.1529 will not solve all of the problems of the Federal judicial system caused by the massive increases in litigation. But at very modest cost, the creation of the National Court of Appeals will be a significant step toward alleviating some of the worst symptoms of the distress.

Again, the American Bar Association appreciates the opportunity you have afforded it to testify in support of this essential legislation. I, personally, appreciate the opportunity to be the Association's spokesperson.

If you have any questions I shall be pleased to try to respond.

Monday, October 5 Order List

No. 80-2106: General Atomic Co. v. United Nuclear Corp.
Justice Blackmun would grant certiorari.

No. 80-1838 Int. Society for Krishna v. Evanston
Justice Brennan and Justice Marshall would grant the petition for writ of certiorari, vacate the judgment and remand the case to the Appellate Court of Illinois, First District, for further consideration in light of Parrat v. Taylor, 451 U.S. ____ (1981).

No. 80-1994: Nash Cty Bd.Ed. v. Biltmore City.
Justice Brennan and Justice White would grant certiorari.

No. 80-2120: Witt v. Harbour.
Justice Brennan would grant cert.

No. 80-2089: Petty v. United States
Justice Brennan, Justice White and Justice Marshall would grant cert.

No. 80-1937: FERC v. Pub. Serv. Comm. of NY
No. 80-1938: NC UTL. Commn. v. Pub. Serv. Commn. of NY
No. 80-1939: NC Natural Gas Corp. v. Pub. Serv. Commn of NY.
Justice Brennan, Justice White and Justice Blackmun would grant certiorari.

No. 80-2094: Weaver v. Payton.
Justice Brennan and Justice Blackmun would grant certiorari.

No. 80-2114: Lochiatto v. Florida
Justice Brennan and Justice Marshall would grant the petition for a writ of certiorari and reverse the convictions.

No. 81-5158: Palmer v. Florida
Justice Brennan and Justice Marshall dissenting on death penalty.

No. 80-180: Reid v. Georgia.
Justice Marshall would grant cert.

Order List for October 13, 1981

No. 80-1958: Louisiana Dairy Board v. Dairy Fresh Corp.
The Chief Justice and Justice Rehnquist would note.

No. A-210: Michigan v. Rucinski
Justice Rehnquist and Justice O'Connor would grant the application for stay.

No. 80-6514: Hawkins v. Texas
Justice Brennan and Justice Marshall dissenting on death penalty.

No. 81-5336: Martin v. North Carolina
Justice Brennan and Justice Marshall dissenting on death penalty.

No. 81-5189: Mercer v. Missouri
Justice Brennan and Justice Marshall dissenting on death penalty.

*No. 80-1831: Board of Education of North Little Rock v. Davis
Justice Rehnquist dissenting.

*No. 80-2082: Boles v. Chavis
Justice Rehnquist dissenting.

*No. 80-2169: Davis v. Jacobs
(and 17 others)
Justice Rehnquist, the Chief Justice and Justice Powell dissenting (whether to dismiss or deny habeas corpus petitions; I enclose the memo on the named case as representative of all of them)

*No. 80-6519: Johnson v. Virginia
Justice Marshall dissenting.

*Nos. 80-6704 and 80-6759: White v. United States; Anderson v. United States
Justice White, Justice Brennan, Justice Marshall dissenting.

*No. 81-191: Needham v. White Laboratories
Justice Rehnquist dissenting.

Order List for October 19, 1981

No. 81-5372: Barfield v. North Carolina
Justice Brennan and Justice Marshall dissenting on death penalty.

*No. 80-1494: United Air Lines, Inc. v. Div. of Industrial Safety
Justice White dissenting.

*No. 81-112: Michael v. United States
Justice White, Justice Brennan, Justice Powell dissenting.

*No. 81-5009: Crouch v. United States
Justice White and Justice Brennan dissenting.

*Cases with published dissents.

To be filed April 1, 1974
Washington, D.C.

STATEMENT OF SHIRLEY M. HUFSTEDLER, CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM.

Mr. Chairman and Members of the Commission:

I welcome the invitation to address the Commission on the subject of the creation of a new national court, a topic to which I have given a great deal of attention during the last several years, individually, and as a member of the Advisory Council on Appellate Justice ("ACAJ") and, more recently, as a member of the American Bar Association's Special Committee on the Coordination of Judicial Improvements ("ABA Special Committee").

In my recent address for the American Bar Foundation and the National Conference of Bar Presidents, delivered in Houston on February 3, 1974, I stated the reasons for my conviction that an essential ingredient of any formula for relief of the federal appellate system is the creation of a new intercircuit court of appeals.* I shall not reiterate those reasons today.

The House of Delegates of the American Bar Association reached the same conclusion, although not necessarily for the same reasons, when it approved the recommendation of the ABA Special Committee calling for the creation of a national division of the United States Courts of Appeals. ACAJ has endorsed the same concept.

The ABA Special Committee and ACAJ have agreed upon the basic outline of the new tribunal: Congress creates the new court and, from the existing appellate jurisdiction of the Supreme Court, it carves out the new court's outer jurisdictional limits. Congress authorizes the Supreme Court, using its rule-making power, to select those classes of litigation within the jurisdictional grant that the Supreme Court will transfer to the new tribunal for initial recommendations or decisions. The Supreme Court retains its power to accept or to reject any case for hearing. The judges of the new court will be drawn from active United States circuit judges, agreeable to service. No decision of the new tribunal becomes final until after the elapse of a specified period of time after the Supreme Court has received the records, decisions, and recommendations from the new tribunal and the Supreme Court has not taken action upon them. Absent such action, judgments of the new court become final and create binding national precedents.

The House of Delegates was not asked to and it did not approve any details of the design. ACAJ has expressed its view of the essential jurisdictional components in its resolution that is before you, but it has not taken a position on the substantive or procedural specifications for the new court beyond its resolution of January 19, 1974. None of my remarks today should be attributed to ACAJ.

The February, 1974 Report of the ABA Special Committee stated its recommendations in respect of a number of the design alternatives. In its meeting March 15-17, 1974, the Special Committee modified its recommendations in the following respects: (1) It eliminated the 65-year-old age limitation from the requirements of eligibility for service on the new court and added a provision that not less than one judge from each circuit be selected; (2) as its first alternative for the selection of judges from the eligible pool, it chose a commission nomination subject to concurrence by not less than six Supreme Court Justices, leaving its former first alternative as its second choice; (3) it modified its jurisdictional

* The address will be published shortly in the American Bar Association Journal. Professor A. Leo Levin, Executive Director of this Commission, has received a copy of the address.

recommendations by striking tax case bypasses, eliminating review of federal criminal convictions; (4) specifying those federal administrative agencies subject to transfer; (5) limiting cases from state courts of last resort to direct and collateral attacks on state criminal convictions; (6) adding intercourt conflict cases; and (7) adding new federal legislation, as Congress may from time to time specify. The Special Committee also approved a procedure for the laying-on-the-table component of the design.

I confine my prepared testimony today to an explication of the following elements of those design details: Jurisdiction of the National Division, Judicial Complement of the National Division, Selection of Judges for the National Division, and National Division Procedure and the Operation of the Laying-on-the-Table Procedure. I will, of course, gladly submit to interrogation by the Commission on each of these subjects or any other aspect of the proposals which may be of interest to the Commission.

I.

Jurisdiction of the National Division

Congress grants jurisdiction to the National Division (1) by selecting classes of litigation from the appellate jurisdiction of the Supreme Court, and (2) by authorizing the Supreme Court, using its rule making power, to choose from the congressional list any or all of the classes of cases that will be transferred to the National Division for initial decision.

The congressional list should include the following categories of litigation: (1) all tax cases; (2) all patent cases; (3) all petitions to review 1/ decisions of state courts of last resort granting or denying relief in direct or collateral attacks on state criminal convictions; (4) all petitions to review decisions of cases in which the following administrative agencies are parties: National Labor Relations Board, Securities and Exchange Commission, Federal Communications Commission, Federal Power Commission, Federal Aviation Administration, and the Interstate Commerce Commission; (5) petitions for review claiming intercourt conflict or disharmony involving federal questions, other than constitutional issues; and (6) petitions for review of decisions interpreting and applying such federal statute or statutes as Congress may from time to time specifically designate in enacting new legislation or in amending existing legislation. 2/

With the possible exception of the sixth category, the initial jurisdictional grant to the National Division should not include a bypass of the regional courts of appeals. Bypass entails more radical change than may be presently warranted, and it may engender

1/ In the context of my testimony, the distinctions between appeal or certiorari are ignored; all applications for review are deemed certiorari petitions.

2/ The sixth category introduces a new element of flexibility in appellate review of federal legislation. When Congress enacts a new statute or amends an existing statute, it could provide that appeals in litigation involving an interpretation or application of the statute would be routed directly to the National Division, bypassing the regional courts of appeals indefinitely or for a fixed period of time, thus permitting reasonably prompt decision of such issues by a court with power to set national precedent. (The concept is not novel; Congress has used it in a highly restricted way by reactivating the Temporary Emergency Court of Appeals of the United States to decide price control cases.) Congress could also route these cases through the courts of appeals to the National Division.

needless apprehensions. Moreover, bypass could cause early overload of the new court. ^{3/}

II.

Judicial Complement of the National Division

The National Division should be assigned 15 judges. The choice of 15 is dictated by a number of factors. To provide adequate decisional capacity and to permit moderate specialization in the tax and patent fields, the new tribunal needs more than a single panel of judges. A single panel of judges should not be less than five because even-numbered panels are unworkable and a three-judge panel does not carry adequate force and prestige when it has the power to reverse state courts of last resort and three-judge panels of the courts of appeals.

A single panel should not be more than seven judges; the addition of judges over seven unnecessarily increases judicial time per case and may come uncomfortably close to the Supreme Court model. If the new court is to have two panels, therefore, the judicial complement must be not less than 10 or 14, depending upon whether the panels have 5 or 7 members.

Five-member panels are more efficient than seven-member panels, not only because the larger panel requires the services of two more judges, but also because every added judge brings another view that must be accommodated in the decisional process. The additional views elongate the disposition time.

An initial complement of 10 judges, however, is not sufficiently flexible to maintain two five-member panels, because it does not allow for temporary vacancies or absences due to illness or other emergencies. To add the necessary flexibility, the court would need not less than 12 judges. If the judicial complement is brought to 15, however, the court could run three five-judge panels most of the time, thus substantially expanding its decisional capacity and enlarging the flexibility of the court. Moreover, a court of 15 members maintains more nearly the pyramidal structure of the federal judicial system.

^{3/} If the existing courts of appeals are not bypassed, how does the National Division ease the burdens of the courts of appeals? In my view, substantial relief will be accorded, although the results cannot be precisely quantified in advance. The relief springs from multiple sources: (1) By providing adequate federal review of federal constitutional issues presented in cases directly or collaterally attacking criminal convictions processed through the state courts, the National Division gives the state prisoner the federal review to which he is entitled without resort to federal habeas. It provides the mechanism to relieve the district and circuit courts of their present overburden from repetitious federal habeas petitions. (Another byproduct is the relief of federal-state tensions caused when a single federal district court judge overturns a state court of last resort in a federal habeas case.) (2) Decision of federal constitutional issues by the National Division in reviewing state convictions will provide a significantly increased body of national authority that will resolve the same issues thereafter presented to the courts of appeals in direct and collateral attacks on federal criminal convictions. (3) The National Division will settle the law in tax and patent cases and in other federal question territories referred to the new court that otherwise excessively breeds litigation, relitigation, and forum shopping. (4) Reasonably prompt national resolution of issues involving the interpretation and application of new federal legislation will avoid multiple appeals in multiple circuits, the present price of uncertainty. (5) A subtler beneficent effect is the impact of greater supervision of the courts of appeals. Added capacity to review decisions of the courts of appeals encourages the courts to exercise increased self-discipline to avoid intra- and intercircuit conflict and jurisprudential disarray. Intra- and intercircuit disharmony promotes appeals.

A court of more than 15 judges would create an unjustifiable drain on the courts of appeals from whose ranks the new court is staffed.

III.

Selection of Judges for the National Division

The judges of the National Division are selected from active United States circuit judges, each with not less than three years' experience as a circuit judge. Upon initial creation of the new court, not less than one judge shall be selected from each circuit, except that, if by reason of declinations of assignment or for any other reason affecting eligibility for assignment to the new court, no circuit judge is available for service from a circuit, that circuit may be omitted from the selection process.

Selected judges will be assigned to the National Division for a substantial period of years. To avoid discontinuity, the initial terms of the assignments should be staggered. When the judges are selected, three judges will be assigned for three years, three for four years, and the remainder for five years. The later replacements for judges rotated back to their home circuits could each serve five-year assignments.

No circuit judge could be assigned to the National Division without his consent.

Congress creates 15 new circuit judgeships to replace the judges serving on the National Division. Upon a judge's assignment to the National Division, a vacancy is created in his circuit to be filled by one of the 15 new judges. A person appointed to fill the vacancy takes the appointment with his consent that he is subject to being temporarily assigned by the Chief Justice from his home circuit to another circuit that may be in greater need of his services when a judge whom he replaced returns to his circuit from the National Division.

Because judges assigned to the new courts are already circuit judges, nomination by the President with the consent of the Senate is unnecessary. There are many devices that could be employed to make the selection from the eligible pool. The most attractive method is that the selection be made by a 12-member commission, appointed three each by the President, the Chief Justice, the Senate, and the House, with the consent of not less than six Justices of the Supreme Court. Inaction by the Supreme Court for a period of 60 days after receipt of the commission's nominees could be deemed consent.

IV.

National Division Procedure and the Operation of the Laying-on-the-Table Procedure

All petitions for Supreme Court review, including those cases to be transferred to the National Division, are filed in the Supreme Court as they are today.

Under rules promulgated by the Supreme Court and under its supervision, clerical personnel in the Supreme Court clerk's office will separate the cases for transfer to the National Division, notify the litigants of the transfer, and send the records and briefs to the

clerk of the National Division. 4/ Following notice of transfer, the litigants file all further documents with the clerk of the National Division. The litigants thereafter can file nothing in the Supreme Court, unless, upon taking a case, the Supreme Court otherwise directs.

When a case is referred to a panel of the National Division for decision, the panel, in the exercise of its discretion, can (1) grant certiorari, (2) deny certiorari, or (3) in criminal cases from state courts of last resort, it can issue an "order of review," hereinafter described. 5/ All final decisions of the National Division become national binding precedents.

1. On granting certiorari

(The National Division follows existing Supreme Court practice on granting certiorari. It can set the case for full plenary consideration, or it can undertake the same kinds of dispositional shortcuts now used by the Supreme Court.

Whether or not any opinion or opinions are written, the National Division prepares a "face sheet" in each case stating the issues and summarizing its decision of the issues. (The face sheet in each of these cases resembles a Supreme Court headnote.) The face sheet and any opinions are sent to the litigants and published.

The litigants can file a petition for rehearing, but no petitions for rehearing en banc will be entertained. The litigants can accompany a petition for rehearing with a suggestion for hearing by the Supreme Court. The panel can reject the suggestion or accept it. If it accepts the suggestion or sua sponte wishes to recommend a Supreme Court hearing, the parties are notified and the recommendation

4/ The sorting of tax and patent cases and those in which named federal administrative agencies are parties is almost mechanical. Routing of cases in the fifth and sixth categories (intercircuit conflicts and new federal legislation, respectively) is more difficult.

*For the purpose of initial transfer, the clerk should be permitted to accept the petitioner's characterization of the basis of his petition as one involving question of federal law, excluding a federal constitutional question, in which the circuits are in conflict or are in disharmony, or one in which Congress has charted the transfer by legislation.

If the petitioner incorrectly characterizes the issues, the National Division and ultimately the Supreme Court can correct him.

5/ A fourth alternative is probably desirable, whereby a majority of the panel sua sponte could forthwith return a case to the Supreme Court in either one of two situations: (1) the case is not properly within the National Division's jurisdiction and is therefore retransferred to the Supreme Court; (2) the case is deemed unusually certworthy, and the panel forwards it to the Supreme Court with a suggestion for hearing.

In the first instance, the case returns to the mine run of petitions pending in the Supreme Court. In the second, the suggestion would be called to the individual Justice's attention. If the Supreme Court took no action on the suggestion for 15 days (during Term), the suggestion would be deemed denied, and the case would be returned by the clerk's office to the National Division for decision. Acceptance of the suggestion would be followed by the present Supreme Court practice upon granting certiorari.

is added to the face sheet and transmitted to the Supreme Court. A rejection of the suggestion is likewise noted on the face sheet. 6/

Unless the Supreme Court takes action on a case, the judgment of the National Division becomes final 60 days after the record has been returned to and lodged with the Supreme Court during Term, and after such additional time period as the Supreme Court shall by rule specify if lodged during recess. 7/

The failure of the Supreme Court to take any action on the case is the equivalent of a present denial of certiorari.

2. On denial of certiorari

The new tribunal prepares a "face sheet" in each case which briefly states the issues raised by the petition (in a form similar to the statement of issues in pending certiorari petitions published in Law Week) and a statement of the court's reasons for denying certiorari. The face sheet is not an opinion. The reasons for denying certiorari may be stated in conclusory terms, or they may be a more elaborate treatment of the issues. In addition to the face sheet, the panel or any of its members may write an opinion concurring in or dissenting from denial of certiorari.

The face sheet and opinions, if any, are sent to the litigants and published.

No petition for rehearing or suggestion for hearing in the Supreme Court will be entertained following denial of certiorari.

The records, briefs, and face sheets are automatically forwarded to the Supreme Court. 8/ Copies are distributed to the Justices. Because the issues are succinctly stated on the face sheet, any Justice can quickly discern those that are of sufficient moment to require more than cursory attention. If a Justice deems any case certworthy, the case can be placed on the conference list. The Supreme Court can accept or reject any case as it does today on certiorari. Unless the Court grants certiorari or takes other action on a case within 60 days after the record has been lodged, during Term, or during such additional time as the Court shall specify during recess, the judgment of the new court becomes final.

The failure of the Supreme Court to take action is equivalent to a present denial of certiorari.

6/ One of the bases for a suggestion for Supreme Court hearing would be claimed conflict between the panels of the National Division. Conflicts will be rare in tax and patent cases because it is contemplated that all tax cases will be heard by the same panel (although the members of the panel will slowly rotate to another panel), and a different panel will hear all patent cases. Such conflicts as do arise within the National Division should be resolved by the Supreme Court. Only if conflict resolution becomes unduly burdensome to the Supreme Court should en banc hearings in the National Division be permitted in the future.

7/ Delay in finality can be reduced by having the National Division commence its term one month before the Supreme Court's Term begins.

8/ In addition, legal memoranda prepared by law clerks for the use of the new court can be forwarded to the Supreme Court, but not to the litigants.

3. On order for review

The order for review is a new procedure that does not have an exact counterpart in existing federal appellate practice. It is created to give the new tribunal greater flexibility in dealing with federal constitutional claims raised in petitions seeking review of direct or collateral attacks on state criminal convictions emanating from state courts of last resort. The order is a procedure that combines some of the features of a certificate of probable cause to appeal with some of the aspects of an appeal. Using an order for review, the new tribunal can undertake as searching a review as the court deems appropriate to reach and to decide the federal questions presented. It can dispose of frivolous questions summarily. In issuing an order for review, the new court can tailor the treatment of issues to the dimensions of the constitutional claims presented. If an evidentiary hearing is required to resolve the federal issue, it can remand the case to a state court to conduct the hearing, or if it is not satisfied that a state court has or will adequately protect the federal rights involved, it can direct an evidentiary hearing in an appropriate federal district court exercising federal habeas jurisdiction.

The issuance of an order for review, rather than a grant or denial of certiorari lies within the new court's discretion.

The order for review procedure terminates in the National Division with a memorandum on review. ^{9/} The memorandum takes the place of the face sheet used in the certiorari granted or denied cases. It states the issues and the court's disposition of them. The memorandum can, but need not be, accompanied by an opinion or opinions.

As in the certiorari granted case, the litigants can file a petition for rehearing and, at this same time, a suggestion for a hearing in the Supreme Court. The transmittal of the record, briefs, and other documents to the Supreme Court, and the procedure within the Supreme Court are the same as those heretofore outlined in the certiorari denied and granted cases.

If the prisoner thereafter files a federal habeas petition raising the same federal issue or issues, the district court can terminate the proceeding with an order citing the new court's disposition.

^{9/} The order and the memorandum can be combined in a single document, if the order, for example, does not direct review beyond the face of the record on certiorari.



AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF
SHIRLEY M. HUFSTEDLER, MEMBER
SPECIAL COMMITTEE ON COORDINATION
OF JUDICIAL IMPROVEMENTS
AMERICAN BAR ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON
IMPROVEMENTS IN JUDICIAL MACHINERY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING S. 2762
LEGISLATION TO CREATE A NATIONAL COURT OF APPEALS

May 19, 1976

May 19, 1976

Mister Chairman and Members of the Subcommittee:

I am Shirley M. Hofstedler, Member, United States Court of Appeals for the Ninth Circuit. I appreciate the invitation to appear before the Subcommittee to express my views on S. 2762. In appearing before you, I speak as a member of the American Bar Association's Special Committee on Coordination of Judicial Improvements, and not as a representative of other members of the federal bench.

The creation of a National Court of Appeals with reference to jurisdiction is a vital and necessary addition to the federal judiciary structure. The primary purpose of the new court is and should be to meet the needs of the general public and litigants in the federal courts for greater stability and predictability of national law. An important byproduct of the new court, however, will be some relief to all of the beleaguered courts in the federal system.

The United States Supreme Court is the sole judicial institution empowered to pronounce law binding the whole federal judiciary. Therefore, it is the only agency that presently can eradicate inter-circuit conflict; harmonize churning issues of national law, not only between circuits, but also within and between federal administrative agencies; and effectively supervise lower federal courts. The Supreme Court

simply does not have the decisional capacity adequately to perform these essential tasks. The Court can give plenary consideration to not more than 200 cases per year, and usually the figure is closer to 150 cases per year.

The decision of these 150 cases is not enough to keep the federal jurisprudential house in order. Thousands of the cases pending in the Courts of Appeals do not involve questions of unsettled federal law, although they may concern thorny problems in applying the law to the particular facts. However, hundreds of those cases do present serious questions of national law which are unsettled within and between circuits. These cases are potentially certworthy; indeed, they are the very kinds of cases that the Supreme Court would have heard a decade or two ago, before their numbers multiplied beyond the Court's capacity to take them. Cases in this category are highly diverse because, quite apart from the impact of the Federal Constitution, federal statutes reach into every cranny of our national life. Thus, these cases deal not alone with federal taxation, patents, copyrights, bankruptcy, admiralty, immigration and naturalization, and anti-trust laws, long recognized as requiring definitive rulings with nationwide effect, but also with such subjects as environmental law, equal opportunity legislation, energy allocations, truth in lending, social security, welfare, securities laws, elections law, freedom of information laws, privacy acts, and administrative law in all its myriad hues. The need for

reasonably prompt, nationally binding decisions construing new statutory law is acute. The lack of such decisions breeds excessive litigation before federal administrative tribunals and before all of the lower federal courts. In the effort to obtain national precedents, litigants bring action after action throughout the country, not only to obtain judgments in particular cases, but also to generate intercircuit conflict hoping thereby to open a path to the Supreme Court. The major litigator in the federal courts is the Government. It can sue and be sued across the land, with the result that it has both the means and often the motive to relitigate national law issues in multiple circuits. Moreover, many of the cases in these new fields of statutory law are extremely complex, the environmental cases are an outstanding example. Without definitive decisions, both public and private rational planning is thwarted.

The number of cases that the Supreme Court can hear cannot be significantly expanded, but the volume of litigation rises precipitously. In each succeeding year during the last 15 years, the number of cases has set new records at all levels of the federal judiciary.^{1/} At the close of fiscal year 1975, over 16,600 new appeals were filed in the Courts of Appeals, to which must be added over 12,100 cases in the backlogs of those courts.^{2/} The rate of increase of appeals declined in fiscal 1975, but climbed steeply again during the current fiscal

^{1/} 1975 Annual Report of the Director, Administrative Office of the United States Courts, XI-10.

^{2/} Ibid.

year.^{3/} The Supreme Court cannot review more than about one percent of these cases at the present time, after estimating deductions for those cases in which review cannot or will not be sought. Courts of Appeals can neither be right nor harmonious 99 percent of the time.

We have no basis for believing that the federal litigation inflationary spiral will decrease significantly. To be sure, some of the bills before Congress and others that have been proposed, such as bills to reduce diversity jurisdiction, would provide some relief to the lower federal courts, but these measures will not alleviate the pressures that the National Court of Appeals is designed to ease. Among the reasons why this is so are the following: first, Congress has shown no inclination to reverse its long-time pattern of adding more jurisdiction to the federal courts than it subtracts; second, many of the proposed jurisdictional cuts, for example, the reduction of diversity jurisdiction, do not involve national law questions to which the National Court of Appeals is addressed. Furthermore, some of the proposed curtailments of jurisdiction, such as those in the civil rights area, affect sensitive and volatile issues that augur extremely difficult rites of passage. Even if this pessimism is unwarranted, however, and federal district jurisdictional cuts as large as 20 percent could be achieved and could be directly translated into corresponding deductions from the dockets of the Courts of

^{3/} The Administrative Office's current projection for fiscal 1976 is a 12.3 percent increase over 1975.

Appeals, we would still be left with more than 13,000 new appeals each year (using 1975 figures). The effect would be to return the dockets of the Courts of Appeals to their 1971 levels.^{4/} The reduction would permit only a slight increase in the percentage of reviewed decisions from the Courts of Appeals and no increase in their absolute numbers.

Although the impact of increased decisional capacity embodied in the National Court, upon the lower federal courts cannot be precisely quantified, I believe that considerable savings of time will be realized. One can make a very rough estimate. If we assume that the National Court will decide about 150 cases per year, I think that those decisions will dispose of not less than 300 cases pending in the Courts of Appeals. My modest hypothesis is that for each case decided by the new court, there will be at least two cases pending in different circuits which turn on the key issue decided by the National Court. The effective disposition of 300 hard cases will provide meaningful relief to the circuits. In addition, for every case pending in the Courts of Appeals, many more cases raising the same issue will be pending in the federal district courts. One nationally binding precedent has a substantial multiplier effect on all of the lower federal courts. Moreover, many cases that would otherwise have been filed simply will not be filed when the law has been settled.

Finally, the National Court can save some of

^{4/} See footnote 1, *supra*.

the Supreme Court's time. The most obvious saving is relieving the Court from having to take any cases to harmonize national law in respect of issues that would not otherwise be of sufficient gravity to merit the Court's attention. Deciding not to decide cases of this kind, as well as deciding them, now consumes a good deal of the Justices' time.

A perusal of the Supreme Court's docket this term and last reveals numerous noted dissents from denials of certiorari grounded on the need to eliminate inter-circuit conflict. These savings are not seriously eroded by the potential return to the Court of referred cases. Plenary consideration of such cases will surely be rare, and in those few instances in which the Court will take the case, the issue will be important enough to warrant the Court's time.

The criticism that reasonably prompt decisions by the National Court of Appeals will prevent useful "percolation" is unwarranted. The Supreme Court as the source of reference can always decline both to decide and to refer a case that it believes is unripe for decision. The National Court can do the same thing unless the Supreme Court otherwise directs. Moreover, the claim that aging improves decisions is greatly exaggerated.

As your Subcommittee is aware, the American Bar Association does not support transfer jurisdiction. Although transfer jurisdiction has merit, it entails many difficult problems that are presently unresolved and decisions about its ultimate efficacy are premature.

Statement Of

Honorable Shirley M. Hufstедler
United States Court Of Appeals
For The Ninth Circuit

On The

General Issues Of The State Of The Judiciary
And Access To Justice

Before The

Subcommittee On Courts, Civil Liberties
And The Administration of Justice
Committee On The Judiciary
U. S. House of Representatives

Thursday, July 21, 1977

Mr. Chairman and Members of the Subcommittee:

My name is Shirley M. Hufstедler. I am a judge of the United States Court of Appeals for the Ninth Circuit. I am appearing before your Subcommittee primarily in my capacity as a member of the American Bar Association's Special Committee on Coordination of Federal Judicial Improvements. I have taken the liberty, however, of placing the views of the special committee of which I am a member in a larger context. In doing so, I speak only for myself, and not for the special committee, the American Bar Association, or the court of which I am a member.

Each of the proposals summarized by Mr. Justin Stanley deserves implementation. For example, expansion of judicial personnel contemplated in current bills that add judges to the district courts and the courts of appeals is essential to the present functioning of the federal judicial system. The creation of the National Court of Appeals is urgent if we are to be able to maintain stability and harmony of the national law. The repeal of statutory priorities is needed to give the most seriously overburdened circuits tools for effectively managing present caseloads. Reduction or elimina-

tion of diversity jurisdiction is a reform already two decades overdue.

I would be remiss, however, if I did not forthrightly state that these measures -- necessary though they be -- do not go to the heart of the matter. Access to justice involves complex problems that can never be solved by tinkering with the federal judicial system. A host of new approaches must be tried that do not involve the federal courts or any version of the litigation model if we are to make real headway in the quest for justice for all Americans.

We must confront a series of unpleasant truths and make some hard choices among limited options. One of these truths is that the federal judicial system is a relatively inelastic institution. The system as it is presently structured and staffed is inadequate to carry the present caseloads. The modest expansion of that structure horizontally (adding judicial personnel to existing tiers of the federal judicial pyramid) and vertically (adding the National Court of Appeals) will help us. But there are severe limitations upon further growth which cannot be exceeded without destroying the very qualities which have caused these courts to be so highly valued.

As compared with other governmental institutions, the federal courts have been, or at least have been perceived to be, more accessible, visible, personal, responsive, and independent. When I say "accessible," I do not mean to imply that everyone can take his or her grievance to the federal courts. Jurisdictional limitations as well as economic barriers have limited access to the federal court system. But for those who have surmounted these hurdles, the means of gaining entry to the federal judicial system is well known, and it is not difficult. Of equal importance, a decision will be made which can be heard or seen or both, and that decision will be made by a person or persons who can be identified. The complainant thus has some contact with a human being who is obliged to read or to hear the complaint and to make some kind of decision that must be communicated. Thus, courts have not only been responsive, but courts have also been more often responsive

to the complaints of the disadvantaged, the poor, the weak, and the unpopular than their governmental counterparts. Federal judges with lifetime tenure have had the independence that permits them to make just, though unpopular decisions, without risking the wrath of political constituencies or shifting majorities. The institutional structure has assured each litigant (except the Government in criminal cases), one appeal as a matter of right, and the opportunity to apply for Supreme Court review, no matter how unlikely a hearing before the Supreme Court may be.

A judicial system cannot be expanded horizontally beyond the capacity of the next tier to process the added cases. For that reason, district courts cannot be indefinitely expanded, unless access to the appellate courts is correspondingly curtailed. A judicial system cannot be indefinitely expanded vertically because cases that should reach the top of the ladder fall by the wayside due to delay, expense, or battle fatigue.

Judicial personnel cannot be indefinitely added without imperiling the quality of persons attracted to the bench. Nonjudicial personnel cannot be perpetually increased without turning courts into the impersonal bureaucracies which the litigants are trying to escape.

In short, federal judicial time is a scarce commodity. The supply can be increased a little, but very little, without impairing or destroying its value. We must face up to the fact that we have to treat federal judicial time as we have treated other essential resources in the periods of shortage. We have to inventory our present and future supply to ascertain the totality for distribution. The materials for that inventory are already in stock. We must next identify and measure the present and future demands on that supply. As Mr. Stanley observes, the raw materials for that survey are also on hand. Next, comes the painful task: we must match the demands against the resources, assign priorities based upon an evaluation of those needs, and ration access accordingly.

Conceptually, the easiest part of the task is to enforce a limit of one trial court to a customer and to insist that the

only available court be the one in greater supply. In concrete terms that means the elimination of all overlapping jurisdictions within and between judicial systems. It means that federal diversity jurisdiction must eventually be eliminated absent very strong evidence that in some classes of litigation access to the federal courts is necessary to preserve an overriding federal interest. Aggregate federal judicial time will always be in scarcer supply than aggregate state judicial time because the states have 50 judicial pyramids and the federal system has only one.

It is also easy to state abstractly the indicia for awarding the highest and lowest priorities. In the highest priority are those cases in which there is a great social need for the resolution of a particular kind of controversy and in which the federal judicial system is especially or uniquely suited to decide that controversy. For example, no one suggests that we should remove from the federal courts such cases as treaty controversies, customs and tariff controversies, or cases involving the use of national resources such as the air waves.

In the lowest priority are controversies that are exacerbated rather than resolved by judicial proceedings and those that, though not worsened, do not yield to the remedies that courts can effectively administer. In the context of the federal system, the lowest priorities should be assigned to those controversies that can be just as well or better handled by the state court systems.

In establishing a system to ration federal court time, attention should be focused on the nature of the controversy and not upon the individuals who are litigants in the controversy. The economic situation of the individuals should not be a determining factor. Both the rich and the poor need access to the federal judicial system. Thus the inquiry is not whether consumer litigation or federal securities litigation should be in or out of the federal courts. The inquiry should be: what kinds of consumer litigation and what sorts of litigation about federal securities law should be in or out of the federal courts? As unpleasant as it is, we have to ask both whether a particular class of litigation belongs in the federal courts, rather than in state court systems,

or nonjudicial agencies, and whether that class of litigation is more or less worthy of retention in the federal system than other classes of cases with which it competes for the scarce resource.

Even with the expansion contemplated by proposed legislation, the federal judicial system is saturated. This means that each time Congress adds another burden to the federal judicial load, it must always consider removing federal jurisdiction that it has earlier granted. Although we may not know precisely the impact of a new grant of federal jurisdiction, we do know that every new grant of federal jurisdiction now means that either the new grantee or some previous grantee of federal jurisdiction will have to go to the end of the line awaiting its turn for access to the courts.

Speaking only for myself and not for the American Bar Association or any other member of the court upon which I sit, I suggest that Congress seriously consider some alternative approaches to access to justice that do not involve litigation. In large measure, the pressure for the litigious way to justice is caused by reason of the frustration and the failure of our citizens to obtain redress from other governmental institutions which were built to serve them and by the disappearance and depersonalization of the public and private institutions that earlier served many of our needs. A large part of judicial time today is devoted to inducing courts to force public institutions to perform the functions that they were designed to serve. Can we not design other means by which public institutions may be rendered accountable? Is it impossible to restructure large, depersonalized, complicated personal service bureaus to permit them, at least on a local level, to function in a more humane and personal way?

The neighborhood justice centers are a step in the right direction. I suggest, however, that other experimental models should be designed to address the problems with which our citizens, rich and poor, are faced and not simply to give each of them or masses of them a lawsuit by which to adjudicate disputes or to compel other governmental institutions to obey the law.

PREPARED STATEMENT OF A. LEO LEVIN

My name is A. Leo Levin. I had the privilege of serving as Executive Director of the Commission on Revision of the Federal Court Appellate System, commonly known as the Hruska Commission after its distinguished Chairman, Senator Roman L. Hruska. That Commission filed its final report with the Congress in 1975 and recommended the establishment of a National Court of Appeals. Thus, I am both honored and pleased to be afforded this opportunity of testifying before you on S.1529, the most recent legislative proposal for the creation of such a tribunal.

I currently serve as Director of the Federal Judicial Center but, as you know and as I am bound to note, I speak only in an individual capacity and not for the Federal Judicial Center; on matters of policy the Center speaks only through its Board.

Permit me the privilege at the outset of paying tribute to Senator Howell Heflin, the author of the present proposal. His outstanding record in the field of judicial administration at the state level is too well known to permit recounting here; the present bill gives evidence that his interest in judicial administration will continue on the national scene. The very introduction of the bill, and the present hearing contributes to a focused national debate concerning a particularly acute need of the federal judicial system.

It is helpful to think of the federal judicial system as a pyramid. At the base are the United States district courts. In 1960, filings in the district courts were approximately 60,000. In 1981, over 211,000 cases were

filed. As filings increase in the federal trial courts, it is possible to add additional judges, and the Congress has done so. The Congress has also provided additional support by way of magistrates. Moreover, judges have increased their productivity significantly. I do not mean to minimize the problems facing the district courts, but it seems fair to say that they are far more tractable than those facing the United States courts of appeals and the United States Supreme Court.

As we go up the pyramid, we find the United States courts of appeal. The increase of filings in this court over one decade has been almost exactly one hundred percent; over two decades, the increase has been close to five hundred percent. Here, too, some remedies have alleviated what would otherwise have become a totally intolerable situation. First, are new procedures: no oral argument in many cases, fewer opinions, mechanisms for increasing settlements--all these have contributed to increased productivity. The Congress, too, has added judgeships and provided for an additional circuit. As caseloads continue to mount, still more judgeships will be required, and a variety of additional innovations and adjustments will have to be explored.

As we turn to the apex of the pyramid, the United States Supreme Court, the figures are no less dramatic. In its 1951 term, the Court had 1,353 cases on its docket. Last term the Court's docket had 5,144 cases. (I note, parenthetically, that cases on the docket are not identical with filings; these figures also include cases filed too late in the previous term to be reached. These were the data presented at the 1981 Brookings Semiminar at William-

sburg and, in any event, the trends demonstrated are the same as those shown by filings.)

Federal judicial statistics alone understate the situation. First, our society has become more complex and so have the issues presented to the Court. Second, the Supreme Court is not only at the apex of the federal court system. In a very real sense, it is at the apex of a second pyramid, one in which all state courts constitute the base, for much of the business of the United States Supreme Court comes from the state courts. The Supreme Court must resolve, with finality for the entire country, issues of federal law that come to it without ever having been part of the workload of the United States district courts or courts of appeal.

Further, as must be clear on a moment's reflection, solutions which are applicable to other federal courts are inapplicable to the United States Supreme Court. There can be no sitting in panels; realistically, there can be no increase in the number of Justices. Some ameliorative steps can be taken, e.g., eliminating the obligatory or mandatory appellate jurisdiction of the Supreme Court to give it control over its own docket. All sitting members of the Court in recent years formally expressed support for this step, and it is heartening to observe that legislation to this effect is being considered. Important as this legislation is -- indeed, it can be termed urgent -- it is likely to provide greater relief to lower courts and to litigants than to the Supreme Court itself. I say this because the Supreme Court has developed summary procedures, which include no oral argument and no opinion. These are used even in cases that the Court is mandated by

statute to decide on the merits. Clearly, however, such decisions can hardly be considered the equivalent of a result arrived at after plenary consideration and accompanied by an opinion. The Supreme Court has recognized as much. For this reason, it is familiar learning today that dismissal for want of a substantial federal question is to be read as more akin to a denial of certiorari than to a substantive determination that no substantial federal question was submitted.

Analogous to dismissal for want of substantial federal question is the summary affirmance. Here, the significance of the summary affirmance is dramatically illustrated in the pages of the United States Reports: "When we summarily affirm...we affirm the judgment but not necessarily the reasoning by which it was reached," Chief Justice Burger wrote. Indeed, he added, "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."

A whole literature has developed as to what these summary dispositions mean. The important point here is to illustrate how hard-pressed the Court has obviously felt when it deals in this fashion, with substantial penalty to lower courts and to litigants, with cases in which the Congress has provided for an appeal as of right. No arguments concerning whether the Court can do more than it is currently doing, whether the Court needs relief, whether the Court can discharge all of its obligations fully under the present system, speak as dramatically as the recorded history of what has happened in this particular field.

The basic question which the Hruska Commission

confronted and with which §.1529 is intended to deal may be framed as follows: Is there today adequate capacity in the federal judicial system to maintain clarity and coherence in the national law? In simpler, perhaps simplistic, terms, the question is whether the Supreme Court can do all that needs to be done, or are too many questions of federal law left unanswered for too long - again, with unfortunate results for litigants who are entitled to and would like to have definitive answers to pressing, practical questions?

The entire subject is perhaps best illustrated by two opinions in the recent case of Brown Transport Corp. v. Acton Inc., 439 U.S. 1014 (1978). The first is by Mr. Justice White, with whom Mr. Justice Blackmun joins, dissenting from the denial of certiorari in a very prosaic case. The question in that case was "whether failure by [a common] carrier to comply with the time limits prescribed by [federal regulation] estops the carrier from collecting the freight charges from the shipper." There was a conflict in the decisions which treated the subject previously. This was certainly not an issue of great national moment, but for the litigants it was an important question. For all of us, it raises the questions of whether it is equitable, whether it is fair, for federal law to vary depending on geography, providing for one set of rights in one part of the country and denying them elsewhere. To put the point differently, should the law governing federal taxes or federal entitlements be different in Georgia than in Oregon?

A single case is not, by itself, so terribly important. Of greater significance is the fact that Mr. Justice White, in his opinion, analyzes a single conference list, the first for that term of Court, and shows how very few cases are

granted review. The opinion includes some six printed pages of cases in which certiorari was denied although there were conflicts with decisions of either federal and state appellate courts, or arguable conflicts with the United States Supreme Court opinions. I emphasize that the cases were drawn from only one list at the beginning of one term. The Chief Justice, who did not join in the dissent, nonetheless filed a memorandum opinion indicating his view that the problem was pressing and that with the enlargement of the federal judiciary as a result of the Omnibus Judgeship Act, the demands on the United States Supreme Court, particularly with respect to assuring consistency in the federal law, would be even more pressing in the future.

Obviously, since the Supreme Court cannot be expected to take any more cases than it presently does, and maintain quality, as the number of cases on its docket increases, the percentage granted review continues to diminish. Forty years ago the figure stood at 17.5 per cent, five years ago it had dropped to 3.6 per cent and there is every indication that it will continue to diminish.

If our interest is in the administration of justice and the dispensing of justice promptly and efficiently to litigants, it may be helpful to explore the implications of the inability of the system to provide adequate capacity to maintain clarity and coherence in the national law. Dean Erwin Griswold, who served in distinguished fashion as Solicitor General of the United States, has described a problem in the valuation of mutual funds in a decedent's estate for tax purposes. The regulations issued were tested in the tax court, in four courts of appeal, and in a district court in a fifth circuit. Ten years after the

regulations were promulgated the United States Supreme Court held them invalid. In the interim, thousands of cases were held in abeyance, much bootless litigation and many administrative conferences were engendered -- at substantial cost to the government and to the taxpayers.

The test for whether or not remedial legislation of the type here proposed should be favorably considered is not whether the system has already reached that level of crisis that its very existence is threatened. The time to fashion solutions should come long before then. The question is whether our system would be substantially improved by the creation of a National Court of Appeals.

When the Hruska Commission completed its work, before publication of its report, it invited each of the then-sitting Justices to submit his view for the record and these statements were published as an appendix to the report.

Perhaps the need for an additional court can best be summarized by the statement of Mr. Justice Blackmun that

Some of us here worry about the cases that we "barely" do not take, namely, those that almost assuredly would have been taken twenty years ago. The country has grown and surely it has become much more complex.

Mr. Justice White wrote that:

For myself, I am convinced that there is a substantial number of such cases and that there are enough of them to warrant the creation of another appellate court, at least on a trial basis.

Mr. Justice Powell described himself as in substantial accord with the views expressed by Mr. Justice White, and

Mr. Justice Rehnquist said:

The Commission has made out a convincing case for the creation by Congress of a National Court of Appeals along the general lines described in your report.

The Chief Justice stated that:

Up to now I have neither advocated the creation of an intermediate court nor expressed any view, but I have

no hesitation in stating, now, that if other remedial measures are not adopted, the creation of such a court is inevitable.

The Chief Justice elaborated on this view at some length in 1975 and reiterated his view with some emphasis, in the opinion referred to above, in 1978.

Mr. Justice Stewart, in 1975, stated that he thought it likely that the day would come when a new court would be needed, and certainly the substantial increase in the size of the federal judiciary and in the volume of cases points to the need for examining whether that time has not already come. Of course, there were those who disagreed. It is interesting to note, however, that even among some who disagreed with the proposal, there was recognition of a need for providing additional capacity for consistency in federal law, albeit a view that alternative, less drastic remedies might be preferable, at least in the first instance.

Mr. Justice Marshall's call for "a few well-placed changes in jurisdictional statutes" is illustrative.

Permit me to turn briefly to some of the technical aspects of the bill under consideration. First, I note that the jurisdiction of the National Court of Appeals would be by reference jurisdiction from the Supreme Court. I think it is clear from the responses of the Justices that reference jurisdiction would, in their view, be practicable. Even so vigorous an opponent of the proposal as Mr. Justice Brennan wrote that he was unable then to perceive any reasons indicating that the proposed reference jurisdiction would be unworkable. By way of contrast, the Justices did uniformly express reservations about another head of jurisdiction, proposed by the Hruska Commission, but wisely not embodied in the present bill.

I do feel obligated, however, to express reservations about the provisions in the present bill that would allow cases to be heard by panels of three, five, or seven judges. If the object of the new court is to provide adequate appellate capacity for consistency and coherence in the federal law, then judgments that would be binding on all federal courts and, on questions of federal law and all state courts as well, should not be decided by three judges alone. It should be noted in this connection that the bill itself provides that the National Court of Appeals would be dealing only with cases that had been referred to it by the United States Supreme Court. No panel of three judges, however distinguished, ought to be substituted--even in the limited way in which I here use the term--for the full Supreme Court.

In this connection, I note, too, that there is provision for the designation by the Chief Justice of additional judges to sit on panels of this court and, where they have sat on cases that are being reheard by the National Court of Appeals en banc, such judges would also sit on the en banc court. Again, if we recognize that an important purpose of the National Court of Appeals is to establish coherence and consistency in the law, rather than merely provide an added level of appellate review, it would seem of doubtful wisdom to introduce an additional variable, i.e., the presence of judges who would be sitting on the en banc court only on a temporary basis.

I conclude as I began, Mr. Chairman, by expressing appreciation for this opportunity to present these views and I repeat again my view that the introduction of this bill and the scheduling of hearings on it is in itself a major contribution to the solution of a problem facing the federal judicial system, a problem which promises to become increasingly severe if it is not thoughtfully addressed.

Senator HEFLIN. I believe we will call the next group now, at this time.

I believe the Honorable James Duke Cameron, Justice of the Arizona Supreme Court, former chief justice of that court, and Mr. John Pickering—who is testifying on behalf of John Frank, Clement Haynsworth, Jr., and Dean Erwin Griswold—are here. Mr. Jonathan Rose, the Assistant Attorney General of the Office of Legal Policy of the Department of Justice, had to leave. He has a statement which we will enter as part of the record.

Chief Justice Cameron, if you would start, it is going to be necessary that I have to make a phone call or two but if you do not mind you can go ahead and start and I will be right back.

**STATEMENT OF JAMES DUKE CAMERON, JUSTICE, ARIZONA
SUPREME COURT, PHOENIX, ARIZ.**

Justice CAMERON. Thank you, Senator Heflin, Mr. Chairman.

I have filed with the committee a statement concerning this legislation and I will state this, that many of my remarks are based upon a thesis I submitted to the University of Virginia in partial satisfaction of a masters degree in the process of justice, and I have provided the committee with two copies of this thesis. Also, the contents of that thesis will be published in the Brigham Young University Law Review and I hope that will be available some time in December.

Again, may I thank you for the opportunity to appear and add my remarks concerning Senate bill 1529 which would establish a National Court of Appeals. The bill as I read it would provide a court with referral jurisdiction from the U.S. Supreme Court, and would have the beneficial effect not only of relieving the Supreme Court of some of the case load but would also provide a doubling of authoritative decisions to guide the courts of the United States, both State and Federal. I support the court in itself and I also support it as a potential evolutionary court to a national court of State appeals or others.

My plea to you today is that you could do a lot more with this court for almost the same effort, and I have proposed a National Court of State Appeals which would be a discretionary court under article 3 with original appellate jurisdiction over all cases that are now filed by State prisoners in the Federal district courts, the courts of appeals, and the U.S. Supreme Court, as well as appeals from the State courts and civil cases. This would then not be a specialized court in the sense of subject matter jurisdiction; it would be a general court having jurisdiction in both civil and criminal cases but limited to the source. This would provide consistency and prompt resolution where consistency and promptness has been totally and completely forgotten in the past.

I would like to point out that we in the State courts should have no quarrel with Federal review of State court decisions where Federal questions are involved. Someone must make authoritative decisions as to Federal questions if there is to be any consistency in the application of Federal law to the States. The State courts in this country which make approximately 98.8 percent of the judicial decisions in this country do, however, need guidelines when it

comes to dealing with Federal questions in the State courts in a consistent and prompt manner.

The time it takes for a final Federal review is woefully inadequate. I think that two examples will suffice, two horrible examples. We have the *Hawk* case in Nebraska. In the *Hawk* case he was sentenced to life for murder in 1937. It was not until 1952, 15 years later and after six trips to the U. S. Supreme Court—in one instance cert was granted—that he was finally released from Federal custody. The only reason he was released, I am sure, is that the State authorities threw in the sponge, and said they were not going to pursue it any further.

The *Greene* case in Florida, a case that I took at random out of the Federal Reporters, Greene was convicted of murder in 1965. In 1978 the U.S. Supreme Court remanded the case to the jurisdiction of the Fifth Circuit Court of Appeals for reinterpretation of a Florida decision with the statement: "The court of appeals will be free to direct further proceedings in the district court or to certify unresolved questions of State law to the Florida Supreme Court." Therefore, it is still not over. The State of Florida still does not know—probably by now they do—what the law is in regard to this case.

As I say, we decide 98.8 percent of the cases. The delay caused by this method of Federal review of State court decisions has resulted in what in my opinion must be the most costly and inefficient system ever devised by man. Admittedly, we have grown callous to this delay, but I would suggest that it cannot be justified. The public, the parties, are entitled to reasonable, prompt determination of Federal questions in a court that speaks uniformly and finally. This is what we are proposing in a National Court of State Appeals.

Now in listening to the testimony this morning, I was struck with the fact that possibly the solution would be that we would have two national appellate courts, one a National Court of State Appeals and one a National Court of Federal Appeals. I am not sure that the Congress is ready for that because of the increase in judicial personnel and the cost, but I do believe that some court must be created which will provide some consistency to the State courts.

This body, this Senate, is concerned with justice for all citizens just as it is concerned with the health and security of all citizens. The evil of the present system of Federal review of State court decisions is that it denies equal and speedy application of the law, and a National Court of State Appeals could correct such a problem.

Mr. VELDE. Thank you, Judge Cameron.
Mr. Pickering?

**STATEMENT OF JOHN H. PICKERING, ATTORNEY, WILMER,
CUTLER & PICKERING, WASHINGTON, D.C.**

Mr. PICKERING. Mr. Chairman, my name is John Pickering. I am a member of the firm of Wilmer, Cutler & Pickering in Washington and am a former president of the District of Columbia Bar.

I am appearing today as an individual to present the statement of three distinguished leaders of the bench and bar who unfortunately were not able to be here today. They are all well known to this committee: John Frank of Phoenix, Ariz.; Judge Haynsworth of the United States Court of Appeals for the Fourth Circuit; and Erwin Griswold, former dean of the Harvard Law School and former Solicitor General of the United States. These three distinguished lawyers have written widely in the field and have submitted a joint statement which I request be incorporated in the record and which I would like now to summarize.

This statement supports the basic purpose of the bill, S. 1529, before the committee this morning, and would suggest that the court be given some additional purposes, one of which would build on the suggestion which Justice Cameron has just made. To summarize, the statement suggests that the National Court of Appeals should have two functions and one nonfunction.

To pick up the nonfunction first, under no circumstances should the National Court of Appeals be able to bar the Supreme Court from review of anything. Now that is currently provided in S. 1529, which specifically says that the Supreme Court may review any case in the National Court of Appeals by certiorari, whether before or after judgment.

Continuing with the statement, on the affirmative side these three gentlemen believe that the National Court of Appeals should be both a court of exit for the Supreme Court and a court of entry into the Supreme Court. The bill presently gives the proposed National Court the exit function. That function is very important because it allows the Supreme Court to refer any matter which it wishes to the National Court of Appeals.

Dean Griswold has written extensively on this subject and the statement simply points out that within the limited number of cases that the Supreme Court can handle there are many cases which are not worthy of full Supreme Court attention and yet need to be settled on a nationwide basis. The freedom of the Supreme Court to choose the important case should be increased by relieving it of the duty to dispose of conflict cases which may be of lesser importance. That is the exit function which the bill provides.

In addition, this statement suggests that the National Court of Appeals should serve as a fourth-tier court to review certain limited classes of decisions on the way to the Supreme Court. The suggestion that the statement makes is twofold in that connection. The first, building on what Justice Cameron has said, is the need for some finality, some end to collateral review of State criminal cases.

The situation at the present time is that a person can have a State conviction reviewed up through the State court system, certiorari denied by the Supreme Court, and then have a collateral round of review start all over again because the denial of certiorari is not and cannot be regarded as *res judicata*. It does not end the matter.

Now as the statement points out in detail, the vices of this system of continued collateral attack are serious. First, they burden the Federal courts by their very numbers; second, because of their volume they cannot be seriously considered as in good con-

science they should be; third, the process is degrading and distressing to the State courts because, while the State courts certainly expect that Federal questions can and should be reviewed by the Supreme Court of the United States and while they may not mind being overruled by that court, there is a certain legitimate objection to being overruled by one-judge district courts. Fourth and most serious of all, unlimited collateral attacks just defeat the objective of finality in the criminal process.

The statement recommends that the answer to this serious problem would be to give the National Court of Appeals jurisdiction with res judicata effect in State criminal appeals. The Supreme Court because of its limited manpower, cannot give serious review to all of these cases, but the National Court could if it were given sufficient resources to do the job.

Review at that level should be of a comprehensive type, the full-scale review advocated by Professor Meador, recently Assistant Attorney General in charge of the Office of Improvement of Judicial Administration. Such review could be given res judicata effect and collateral attack brought largely to an end.

The statement goes on to suggest that there should still be some room for collateral attacks but that should be reserved for those cases which genuinely involve matters of constitutional dimension which could not be raised in the first round, such as the celebrated case of *Gideon v. Wainwright*.

Now a corollary to this idea of granting the National Court criminal jurisdiction on the collateral round, to stop the collateral round, is that no one wishes to have a court that is restricted solely to criminal jurisdiction. To broaden the mix, the suggestion in the statement is that the present obligatory jurisdiction of the Supreme Court to review on appeal a case challenging a State statute where the decision is in favor of the validity of that statute might well be given to this court. That would have the advantage of relieving the Supreme Court of the need for taking the first cut at that issue, and I emphasize "first cut." A second advantage is that it will enrich the mix of the National Court of Appeals.

To conclude, a National Court of Appeals is needed. As a court of exit from the Supreme Court it should receive whatever business that the Supreme Court wants to send it. As a court of entry to the Supreme Court, it should receive the criminal appeals from State courts to the extent needed to give finality to those cases, reserving for collateral attack only those matters which genuinely raise constitutional issues which could not have been raised on the first trial.

The court should also relieve the Supreme Court by taking a first look at what are now appeals from the State courts upholding the constitutionality of State laws. All decisions should be subject to review by certiorari at the Supreme Court.

I thank the committee for the opportunity to present this statement by Mr. Frank, Judge Haynsworth, and Dean Griswold.

Senator HEFLIN. Thank you, Mr. Pickering. We appreciate that.

I did not get to hear both statements. I had a situation that required that I had to leave. I had a very close friend that passed away yesterday and I am trying to make arrangements to go to the funeral, so I did leave and I did not get to hear Justice Cameron.

Justice CAMERON, on the basis that I am familiar with you and have talked to you on numerous occasions on some of your proposals about this, from a case load basis if it went to a National Court of Appeals, how many cases would you envision that would come—in effect, under your concept—would come to a National Court of Appeals on a yearly basis?

Justice CAMERON. Mr. Chairman, I have said and I have stated time and time again that this I think is one of the critical questions you have to ask before creating a National Court of State Appeals which would cover both criminal and civil cases. At the present time there are 7,000 petitions by State prisoners a year in the Federal district courts. I would point out that of those 7,000, very few are of substance.

I took, for example, 50 consecutive petitions in the Federal District Court of Arizona and analyzed them. Of 50 successive cases, 30 were disposed of and dismissed by the Federal court without the filing of a response, so on the face itself they were frivolous or not worthy of consideration.

Of the remaining 20, 17 were disposed of after a responsive pleading was filed by the State, leaving 3. Of the three, there were hearings and I was not able to determine whether they were with the petitioner there or just between counsel. In any event, 2 of those were dismissed and, out of 50, in only 1 was any relief granted and that was to send the matter back to the State court for a further hearing.

The point I am making is that of these 7,000, they will not be that burdensome. I have estimated, using various guidelines—the appeals to the U.S. Supreme Court, the appeals to the circuit courts and what not—that the caseload of this would be about 3,000 to 3,500 cases and the most burdensome will be the close to 500 civil cases which will be cases of substance. Of course, this would be a discretionary court like the Supreme Court, and they would take those that they would feel necessary.

What I am getting at, it can be done. This is 1,500 cases less than now being docketed in the U.S. Supreme Court, and it would relieve the U.S. Supreme Court of approximately 1,500 cases, so it could be done.

Senator HEFLIN. The Supreme Court of Arizona, if I recall, is a five-judge court.

Justice CAMERON. Yes.

Senator HEFLIN. You have an Arizona Court of Appeals.

Justice CAMERON. Yes, we do.

Senator HEFLIN. What is it, how many, seven or nine on your court?

Justice CAMERON. There are five on the supreme court. There are 12 judges on the intermediate court of appeals, sitting in panels of 3, and there are no en banc proceedings.

Senator HEFLIN. I believe Justice Sandra O'Connor came from one of those courts of appeal.

Justice CAMERON. Yes, she did.

Senator HEFLIN. Is there a certiorari review of the decisions of the intermediate Court of Appeals of Arizona by the Supreme Court?

Justice CAMERON. Yes, in all cases, all decisions of the court of appeals are subject to review by the Arizona—

Senator HEFLIN. By certiorari?

Justice CAMERON. Yes, by certiorari.

Senator HEFLIN. By grant? Discretionary?

Justice CAMERON. Yes, discretionary.

Senator HEFLIN. Do you have any idea what percentage of the cases decided by the intermediate Court of Appeals of Arizona in which certiorari is granted by the Supreme Court of Arizona?

Justice CAMERON. Of the petitions for certiorari to the Arizona Supreme Court from the court of appeals, we run from 9 to 11 percent. We average about 10 percent of the cases we would take.

Senator HEFLIN. That you would grant—

Justice CAMERON. That we would grant the petition for certiorari.

Senator HEFLIN. If I recall, in Alabama it was maybe a little different but we probably granted about 17 percent.

Justice CAMERON. In the past, Senator, our court has been higher. As the workload has gotten greater we have tended to go down, and I understand on the national average that 10 percent is not rare.

Senator HEFLIN. Ten percent review by a court?

Justice CAMERON. The State's highest court, from the petitions from the court of appeals, intermediate court of appeals.

Senator HEFLIN. Mr. Velde?

Mr. VELDE. Mr. Chairman, two statements have been submitted for inclusion in the record.

Senator HEFLIN. Yes, we will make all the statements part of the record.

Mr. VELDE. Judge Cameron, you have estimated that if the new court of appeals were created it would double the number of authoritative decisions and the opinions that I guess the Supreme Court is currently producing.

Justice CAMERON. I am assuming that. I am assuming that a nine-man National Court of Appeals would publish as many opinions as a nine-man Supreme Court of the United States. Now conceivably they could publish more or conceivably they could publish less but I do not think the difference would be that great. However, they would be authoritative, I would hope, and of course subject to review by the U.S. Supreme Court.

Mr. VELDE. That would not necessarily eliminate the entire backlog depicted in these charts.

Justice CAMERON. No. The proposal for the National Court of State Appeals I figure would reduce the Supreme Court's present backlog by about 1,500 cases. You would then have, in addition, the review of opinions of the National Court of State Appeals. How many of those would go up, I do not know.

There have been several suggestions. Dean Griswold or Judge Haynsworth—I forget which one—suggested that if you have a nine-man court of appeals that you should not be allowed to go to the Supreme Court unless you have at least one vote in dissent. If you can get nine people to agree on the nine-man court of appeals, there would be no need to go to the Supreme Court. I am not sure that I endorse such a proposal. I would suggest this: That taking

cases from the National Court of Appeals, I think you would have a certain additional distillation of the issues and there would not be that much.

Mr. VELDE. Last week this subcommittee heard testimony on proposals which would limit Federal habeas corpus jurisdiction over State cases. One of the main features of this legislation would be to impose a 3-year statute of limitations under which these writs can be filed in Federal court. Would that kind of approach deal with the problem that your testimony envisions, as far as the establishing of a—

Justice CAMERON. I had assumed in my statistics that that was not going to happen, but I frankly would support such a proposal. It would be an aid to the National Court of State Appeals; it would be an aid to the Supreme Court.

It seems to me that unless there is a drastic change in the law in some areas, that if a person is going to appeal to the Federal courts from a State court decision that he should be required to do so within a reasonable period of time. This is certainly done in most State courts today, that after the matter has become stale they will not consider accepting jurisdiction or not allow the appeal.

We had an appeal to the Arizona Supreme Court, a petition for delayed appeal some 6 years later. We kind of wondered why it came in at that point, and then we found out the defendant's attorney died 3 weeks before he filed the petition, and of course his delayed appeal was on inadequate assistance of counsel. Well, with his attorney dead the attorney could not come back and testify. That is an example, and I see nothing wrong, I see everything beneficial to limiting the time within which you can bring an appeal.

Mr. VELDE. The statistics which you cited from your review of the habeas petitions in Arizona—1 out of 50 or 2 percent—is consistent with the testimony received before this subcommittee last week nationally whereby 2 percent of the petitions were actually heard by a magistrate.

Justice CAMERON. I am glad Arizona is in sync with the rest of the country. We are not accused of this too often.

Mr. VELDE. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you. We appreciate your testimony, and any part of it that will be made part of the record and you want to enlarge on it, we would be delighted to have that, too.

Justice CAMERON. I have filed a statement.

Senator HEFLIN. Fine.

[The prepared statements of Justice Cameron and Messrs. Frank and Rose follow:]

PREPARED STATEMENT OF JAMES DUKE CAMERON

Mr. Chairman and members of the Subcommittee on Courts of the United States Senate Judiciary Committee.

I thank you for this opportunity to appear and comment on Senate Bill 1529. Much of what I say here is a condensation of a thesis I have submitted to the University of Virginia in partial satisfaction of the requirements for a Degree of Master of Laws in the Process of Justice. I have provided some copies of that thesis to the Committee.

This bill establishes a National Court of Appeals, inferior to the United States Supreme Court, which would have referral jurisdiction from the United States Supreme Court. The main attraction of this court is that it will double the number of authoritative decisions and opinions on important questions of law which only a court of national scope and jurisdiction can make. It will also provide relief to the United States Supreme Court which is presently overworked.

I wish, however, to express some disappointment in that the bill does not go far enough. At the present time, state courts account for 98.8% of all the judicial decisions made in this country. The proposed bill would provide relief merely to one court and does little to alleviate the problem of federal review of state judicial decisions involving federal constitutional questions.

To begin with, I would like to note some of the problems of federal review of state court decisions. Under the federal supremacy clause, state courts must not only apply federal law where appropriate, but they are subject to review by the federal courts when federal law is applied improperly.

In the first ten years of its existence, the United States Supreme Court reviewed only seven state court decisions, and

thereafter it reviewed an average of one state judgment a year. This began to change during the reconstruction period following the War Between the States. In 1867, federal circuit courts were given jurisdiction over petitions for writs of habeas corpus filed by state prisoners, and in 1868, the Fourteenth Amendment to the Constitution was ratified which imposed due process and equal protection upon the states as a matter of federal law.

In 1880, the Supreme Court, in *Ex parte Young*, held that federal courts could enjoin state officials from conduct in violation of the United States Constitution. This gave the federal courts substantial power and jurisdiction, requiring them to supervise the constitutionality of state officials' activities.

It may be questioned whether it is necessary for federal judges to review state court decisions to insure that federal law will be enforced in the state courts. After all, state judges take an oath to uphold the Constitution of the United States as do federal judges and are just as capable of interpreting that Constitution and the decisions of the United States Supreme Court as are their brethren on the federal bench. It would seem to follow that federal review is needed only to assure consistency and uniformity in the application of federal constitutional standards in the state courts. The problem then is not the necessity for federal review of state court decisions involving federal questions; some form of federal review will always be necessary. The problem is that in discharging this review function, the federal courts are guilty of delay and inconsistency in applying federal law to the states, to the detriment of state judicial systems and to a degree not needed to assure minimum federal standards of justice to our citizens in the state courts.

Today a criminal defendant typically can take six steps after a conviction in the state courts. These are (1) review by the state's appellate court (if there is an intermediate appellate court, there may be a two-stage appellate process),

and (2) post-conviction procedures in the state court that provide a basis for entry into the federal courts. Next, the defendant can (3) petition for a writ of certiorari or a direct appeal to the United States Supreme Court. If access to the United States Supreme Court is denied, as is most often the case, the defendant then (4) by the filing of a petition for writ of habeas corpus may go to the federal district court. If denied relief there, he (5) may appeal to the United States circuit court of appeals, and if he loses there, he (6) may go back again to the United States Supreme Court, this time from the decision of the court of appeals.

Two examples will suffice. In 1936, Henry Hawk was sentenced by a Nebraska trial court to life imprisonment for murder. Eighteen years later, after numerous actions in the state and federal courts, including six trips to the United States Supreme Court, Hawk was finally ordered discharged by a federal district court.^{1/} The case of *Greene v. Massey* is an example of the current processes. In 1965, Greene and a co-defendant, Sosa, were indicted for murder and were convicted. The conviction was set aside by the Florida Supreme Court, and a new trial ordered. The new trial was held, and the defendant Greene was convicted again. This conviction was upheld by the Florida Court of Appeals against the defendant's double jeopardy claim. Green then sought relief in the United States Supreme Court, which denied his petition for a writ of certiorari. Greene next petitioned for a writ of habeas corpus in the federal district court which was denied. From the federal district court, Greene went to the United States Court of Appeals for the Fifth Circuit which affirmed the federal district court. Again Greene petitioned to the United States Supreme Court, but this time certiorari was granted, and on 15 June 1978, the United States Supreme Court reversed the

^{1/} Hawk v. O'Grady, 137 Neb. 639 (1940), cert. den. 311 U.S. 645 (1940); Hawk v. Hann, 103 F.Supp. 138 (D.Neb. 1952).

decision of the Fifth Circuit. But even this did not conclude the matter in the federal courts. The United States Supreme Court did not finally dispose of this case, but instead remanded it to the Fifth Circuit Court of Appeals for a reinterpretation of the Florida Supreme Court decision of 1968 (some 10 years earlier) in light of later opinions of the United States Supreme Court. The United States Supreme Court stated:

"The Court of Appeals will be free to direct further proceedings in the District Court or to certify unresolved questions of state law to the Florida Supreme Court." 2/

The delay and confusion caused by this method of federal review of state court decisions has resulted in what must be the most costly and inefficient system ever devised by man. Admittedly, we have grown callous to the delay, but I would suggest that it cannot be justified when viewed in the light of any reasonable concept of efficient administration. Some reform is necessary if the state courts, which decide approximately 98.8% of the cases in this country, are to be able to evenly and fairly apply the federal law as the United States Constitution requires. The public and the parties should be entitled to a reasonable, prompt determination of these federal questions by a court that speaks uniformly and finally. As it is, there is neither promptness, finality nor uniformity in federal review of state decisions. It is somewhat ironic that federal courts, in their stated desire to assure due process and equal protection to all citizens, are, by their actions, robbing those citizens of some of the very ingredients of due process and equal protection, to wit, speedy, final and predictable justice, uniformly and consistently applied. As Chief Justice Burger stated:

"The criminal process should not extend over a span of three, five or seven years, with repeated appeals and repeated collateral attacks on convictions. At

2/ Greene v. Massey, 437 U.S. 19, 27 (1978).

some point, there must be finality. Without finality, justice is a myth." ^{3/}

If the delay is intolerable, so is the inconsistent application of federal law to the states by the federal courts. What has happened in the federal judiciary is that the sheer number of cases makes it impossible for the United States Supreme Court to supervise effectively the state and federal judicial systems. Professors Carrington, Meador and Rosenberg have stated:

"The problem of national uniformity derives from a weakness in the federal appellate hierarchy. The weakness is a result of overgrowth: the hegemony of the Supreme Court of the United States is too attenuated to be effective as the unifying arch of the structure. By combined force of numbers and cases and complexity, the national law has outgrown the Court's supervisory capacities. The Court is forced to scant many of the matters for which it bears the ultimate responsibility." ^{4/}

The law from circuit to circuit can be different, and basic United States constitutional questions can depend upon the federal circuit in which the state happens to be located. The law within the circuit can also depend upon which panel of the circuit hears the case. The confusion is even worse at the federal district level. In each state there may be just as many interpretations as there are federal district judges. This is not a criticism of the federal trial judiciary. Most federal district judges attempt to harmonize the law of their district. However, except for the United States courts of appeal, there is no unifying court within the district to enforce consistency in the same manner that a state supreme court does for the state courts.

At this point I should like to comment on the relative competency of state and federal judges. Professor Meador has

^{3/} Warren E. Burger, Annual Report on the State of the Judiciary to the American Bar Association, Chicago, Illinois, Feb. 3, 1980.

^{4/} P. Carrington, D. Meador, M. Rosenberg, Justice On Appeal, West Publishing, p. 209 (1976).

noted that one of the "speculated" theories for the habeas corpus decisions was the lack of confidence in state judges by the Supreme Court. It is also suspected that the idea that the state judiciaries are inferior has played a greater role in congressional legislation. Of course, when we compare the small (fewer than 800 judges), better paid and carefully selected federal judiciary with the many state judges at all levels of responsibility and jurisdiction -- some selected on the basis of questionable political considerations -- the comparisons are not always flattering to the state judges. But when comparing the state judges of courts of general jurisdiction with their counterparts on the federal district court bench, the state and federal judges appear to be equal.

To test this statement, I asked the people who should be in the best position to evaluate the performance of state judges as compared to the performance of federal judges -- the lawyers who practice before the trial courts. These lawyers who submit their clients' cases for decision and who must rely upon the courts for their professional standing, as well as professional income, should be in a position to compare the two court systems. The clerks of the superior, district or circuit courts in selected state jurisdictions were asked to distribute a questionnaire to lawyers who had just filed a civil action in the state court. Each jurisdiction was asked to distribute fifty questionnaires. The jurisdictions were selected on the basis of geographic location and on the basis of differences in the judicial selection process. The jurisdictions selected were:

San Diego County (San Diego), California
 Gadsen County (Tallahassee), Florida
 Palm Beach County (Palm Beach), Florida
 Cook County (Chicago), Illinois
 Sangamon County (Springfield), Illinois
 Essex County (Newark), New Jersey

Monmouth County (Freehold), New Jersey

Bernalillo County (Albuquerque), New Mexico

Spokane County (Spokane), Washington

Milwaukee County (Milwaukee), Wisconsin

Over 50% responded. The actions were about equally divided among divorce (79), tort (71), and contract (74), with "other" accounting for 32 responses. The lawyers were first asked, "If there were no time or jurisdiction problems and you had a choice, would you have preferred to file this case in a federal court or in the state court?" They were also asked to make such comments as they felt necessary. Of those responding, the preference was:

Federal court	34
State court	193
No preference	18

When asked the reasons for their preferences, quicker disposition was given as the reason for favoring both the federal (11 out of 34) and state courts (48 out of 193). Superior procedures and the quality of the judges were the second and third reasons for preferring the federal courts, while familiarity and convenience were the second and third reasons for preferring the state courts.

When asked if the interests of their clients would be better served in the federal court or state court, the results were:

Federal court	30
State court	124
No difference	94

But when asked if the quality of the judges was better in the federal court or the state court, the results were:

Federal court	95
State court	30
No difference	125

58 out of the 95 who said the federal judges were of better quality still preferred to file in the state courts, and 28 thought the best interests of their clients were better served in the state courts.

The total results of this survey are given in the Appendix.

Overall, probably the most notable result of this sampling is the lack of startling or conclusive differences that are perceived by lawyers between state and federal judges. The differences between the two systems rather than the differences between the quality of the judges may well be the more important factor. In any event, the answers to the questionnaire do not indicate that either federal or state judges are clearly superior in the perception of the lawyers. On the contrary, if the answers indicate anything at all, it is that there is not a great deal of difference between the quality of the judges or justice in the two court systems.

To return to Senate Bill 1529, I would then suggest that with a little more money and personnel, a National Court of State Appeals could be created which would provide both a doubling of authoritative national decisions and at the same time solve the problems of the present inconsistent and delayed application of federal law to state court decisions.

It is for this reason that I have proposed that there be created a National Court of State Appeals consisting of nine judges, appointed by the President pursuant to Article III of the United States Constitution, with appellate jurisdiction to review directly state court decisions, both civil and criminal, in which federal questions have been raised and state remedies exhausted. It would consider not only direct appeals from the state's highest court, but would have exclusive original jurisdiction over all collateral attacks on state court decisions presently filed in the federal district courts. This would completely divest the federal district courts of jurisdiction to review decisions of state courts for federal constitutional

questions. It would be a discretionary court. It would also be a court of entry to the United States Supreme Court from decisions of the state's highest court. It would not be a fourth tier in the federal system, standing between the United States circuit courts of appeal and the United States Supreme Court, but a second tier between the state's highest court and the United States Supreme Court, with the federal district courts and the United States courts of appeal being bypassed.

The concept of a National Court of Appeals is not new, and I refer you to the 1968 proposal of the American Bar Foundation for a National Court of Appeals; Judge Clement F. Haynsworth, Jr.'s proposal that "jurisdiction to review on writs of certiorari federal questions in convictions in the state and federal systems in which a conviction is called into question"; the report of the study group on the case load of the United States Supreme Court (The Freund Committee); the Commission on Revision of the Federal Court Appellate System (The Hruska Commission); and Dean Erwin H. Griswold's proposal for a National Court of the United States which would be assigned cases by the United States Supreme Court after that court had granted the petition for certiorari. All of these proposals for a National Court of Appeals had one thing in common, however. They viewed the problem from the standpoint of the federal judiciary and were concerned primarily with relieving the pressure on the United States Supreme Court. There is no doubt that relief is needed, but if the individual litigant is to be relieved of the time-consuming process of federal review and the states are to be given the proper guidance by the federal courts, then the needs of the state courts should also be seriously considered in any proposal for reform of federal judicial procedure.

For such a new court to be acceptable, the following conditions must be met:

1. The United States Supreme Court must remain supreme.
2. The position and prestige of the state courts must not be demeaned.
3. The federal judiciary should not be unduly expanded.
4. The new court must be able to attract competent and able judges.
5. The docket of the court must be manageable.
6. The court and its jurisdiction and procedures must be constitutional.
7. Justice must be done.

I will refer you to my thesis for a discussion of these questions which I believe I have satisfactorily answered. I will today discuss only the question of the volume of the court and whether such a court could handle the number of cases that it will have to consider.

The present volume of habeas corpus petitions in the federal district courts by state prisoners has remained fairly constant over the last ten years. For example:

<u>1971</u>	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>
8,372	7,949	7,784	7,626	7,843
<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>
7,833	6,866	7,633	7,123	7,031

It should be remembered that very few of these habeas corpus petitions filed by state prisoners are of substance and require more than the briefest of attention. These cases have been tried in the state trial court, they have gone through a state appellate process, and quite often state post-conviction procedures. The issues have been sufficiently refined so that they are easy to identify and quickly decide. A survey of 50 habeas corpus petitions by state prisoners in the Federal District Court for the District of Arizona is instructive. Of the 50 petitions, 30 were dismissed without the court requiring a response from the state. Of the remaining 20, 17 were decided on the pleadings. Hearings were held in only 3, and

relief was granted in only one in which the matter was remanded to the state for a further hearing.

The Administrator's statistics on the United States Supreme Court indicate, however, that the total number of cases docketed for the last five years have remained under 5,000 a year. The Freund Committee provided some detailed information for the 1971-72 Term. The report showed that out of a total of 4,371 cases docketed, 1,341 or 30.7%, originated in the state courts. Of this number, 445 were civil appeals and 896 were criminal cases from state court decisions.

If we assume that both the case load and the ratio of federal to state cases in the United States Supreme Court remains the same, and that there is no duplication (which there is), then two figures, approximately 1,500 cases from the United States Supreme Court and approximately 7,000 from the federal district courts, or 8,500 cases, make up the maximum potential case load for the National Court of Appeals. Such a case load would, even with excessive resort to staff, be prohibitive. It is submitted, however, that the actual case load will be much less. First, the same number of state prisoners will not be as likely to seek relief in a National Court of State Appeals as they would in the federal district court. It is more difficult, if not more intimidating, to file in a national court than it is to "walk across the street" to the local federal district court. This would be especially true of the many frivolous petitions now filed in the federal district courts in great numbers. There would be a significantly fewer number of prisoners who will seek relief in the national court than now seek relief in the federal district courts. An indication of this willingness or unwillingness of a state prisoner to seek relief in a national court of appeals can be seen in the statistics compiled by the Freund Committee. For the 1971 Term, there were 1,721 criminal cases brought to the United States Supreme Court from the United States courts of

appeals. What proportion of these were state prisoner cases is not known, but 1,721 cases indicate the number of prisoners, state and federal, who were willing to pursue an appeal to the United States Supreme Court from the United States courts of appeal.

Another indication of the willingness of state prisoners to appeal can be obtained from the number of present appeals to the United States courts of appeals from the federal district courts by state prisoners. In 1980, there were 1,090 appeals by state prisoners filed in the United States courts of appeals. In other words, the number of state prisoners who desired to proceed further from the ruling of the federal district courts to the United States courts of appeals was only slightly more than the number (896) of state prisoners who appealed directly to the United States Supreme Court in 1971, and we do not know how many of these cases are duplications. The figures do indicate the degree of willingness of state prisoners to follow an appellate process from a state court decision, as opposed to a petition in the federal trial court. The federal district court being a trial court, there is more often the hope that the trial court will construe contested facts in the petitioner's favor. This is seldom done, but the hope blooms eternal. Such expectations do not usually extend to appellate courts.

There is, however, another reason a National Court of State Appeals would not have to consider all the 7,000 cases now filed in the federal district courts. That is the certainty of the law and its even application. Today, a state prisoner lives in the belief that he will find the "right" federal district judge. That this does not happen too often is immaterial, as long as the belief remains. No longer will the prisoner be able to shop for the sympathetic judge. The law will be certain, and the prisoner will not be encouraged to file his petition in the National Court of State Appeals

in the hopes of getting some new or different law. Professor Schuman has stated:

"One reason why such a large percentage of criminal prosecutions are closed on a guilty plea without trial is that in most of these cases there is an extremely visible, rigid, appropriate (valid) statutory rule furnishing a standard to support the claim of the state and an absence of any standards to support the claim of the defendant." 5/

A National Court of State Appeals will be applying the federal standards in an even, uniform manner to all state prisoners. The state prisoners will not have the hope of the "luck of the draw" as in the federal district courts.

Second, Congress can, when setting up the National Court of State Appeals, provide a time limit within which a state prisoner could apply from a final decision of the state court to the National Court of State Appeals. This should significantly reduce the number of state prisoners who would file in the national court.

Civil cases may well provide more of a problem for the court because of the substance of the cases. It should be remembered, however, that this will be a discretionary court, and even if it is assumed that the same 500 civil appeals a year are filed with the new court, not all will be accepted any more than they are by the United States Supreme Court. The number of civil cases that the National Court of State Appeals would have to consider, while sufficient and possibly more than are now heard by the United States Supreme Court, will provide a well-rounded and interesting docket, but would not be so extensive as to overwhelm the new court.

These three figures -- 896 (the number of direct criminal appeals by state prisoners to the United States Supreme Court in 1971), 1,721 (the number of criminal appeals by both state and federal prisoners from the United States courts of appeals

5/ Schuman, Justification of Judicial Decisions, 59 Cal. L. Rev. 715, 725 (1971).

to the United States Supreme Court in 1971), and 1,090 (the number of criminal appeals by state prisoners from the some 7,000 decisions of the federal district courts to the United States courts of appeals in 1980) -- indicate that the total number of criminal cases appealed to the National Court of State Appeals by state prisoners should be less than 3,000. When added to the estimated civil appeals of 500, we arrive at an estimated (conservative) 3,500 cases, an amount less than the United States Supreme Court now processes, and a reduction in the United States Supreme Court's case load of some 1,400 cases, or 28%. For a pessimistic projection, if we allowed for an appeal to the National Court of State Appeals of half of the 7,000 state prisoners who now file in the federal district courts, the figure of 3,500 criminal appeals and 500 civil appeals, or 4,000, is still less than the United States Supreme Court's present more numerous and more substantive case load.

CONCLUSION

The thrust of this proposal is to satisfy the primary interest of the states in a system of federal review which will function with reasonable promptness, uniformity and absolute finality.

There must be an end to litigation. The sooner a matter is settled, the sooner the litigants can go on with their business or a prisoner can concentrate on rehabilitation instead of dreaming, as he does now, that somewhere, someday he will find a federal district judge who will turn him loose and even recompense him for the violation of his civil rights by the state court. It should be remembered that in criminal cases, by the time a prisoner reaches the federal courts, he has been given about all of the due process he is entitled to receive. The defendant has been found guilty or has plead guilty, often as a result of a plea agreement approved by the

state court. The case has been reviewed by the state's appellate court on appeal, and the conviction has been affirmed. Frequently he has also sought and been denied post-conviction relief. Chief Justice Burger has noted, in discussing the cost and time involved in extended review of criminal convictions, that

"The tragic aspect was the waste and futility, since every lawyer, every judge and every juror was fully convinced of the defendant's guilt from the beginning to the end." ^{6/}

And Chief Justice Shafer of Illinois has stated:

"What bothers me is that almost never do we have a genuine issue of guilt or innocence." ^{7/}

If the chance that a defendant has a valid claim of reversible error is extremely small, the chance that a defendant will have been convicted of a crime that he did not commit will be even smaller, and that fact is seldom correctable on review.

The proposal would not be acceptable if, in its operation, it damaged the federal system or detracted from the supremacy or prestige of the United States Supreme Court. This proposal will neither harm the federal system nor detract from the position of the United States Supreme Court. It will, however, provide an extra number of authoritative federal law decisions upon which the states and others can rely with a reasonable expectation that they are final and binding.

There will always be some tension between the federal courts and the state courts in the exercise of the supremacy clause of the federal judiciary. Accepting this tension as the logical result of our dual system of courts does not mean that this power and obligation on the part of federal courts to

^{6/} Burger, Address before the Association of the Bar of City of New York, NYCJ (Feb. 19, 1979), at 1.

^{7/} Shafer, Remarks at a Conference of the Center for the Study of Democratic Institutions, June 1968, cited in Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi. L.Rev. 142, 145 (1970).

review state court decisions regarding federal questions should be used to the unnecessary detriment of the state court systems or the litigants. State courts are entitled to prompt and consistent review of their decisions which they are not now receiving and indeed cannot receive under the present procedure. It may be that the burden of multiple review by the federal courts is an even greater burden on the federal judiciary than it is on the state judiciaries, but it is a burden to both the state and federal judicial systems.

There exists, then, in both systems, a need for reasonably prompt and consistent review of state court decisions involving federal questions. A National Court of State Appeals would satisfy that need.

Whatever the mistakes of the past, state courts are aware that the federal judiciary will step in when federal constitutional law is ignored by the states. Restricting the power of the federal district courts to interfere in state appellate court decisions and transferring that power to a National Court of State Appeals will be a step in assuring consistency and prompt finality in state court decisions. I would then urge that the Committee expand the concept to encompass a National Court of State Appeals which would consider matters now being heard by the district courts, the circuit courts, and the United States Supreme Court. If the Committee does not desire to go that far at this time, then I support the present bill. The national court the bill envisions is, in itself, desirable and could well be an evolutionary court which might result in a more comprehensive court in the future.

Thank you all for allowing me to appear before the Committee.

STATEMENT BY JOHN P. FRANK

In behalf of himself

and Hon. Clement F. Haynsworth, Jr., and Dean Erwin N. Griswold

My name is John P. Frank of the law firm of Lewis and Roca, 100 West Washington Street, Phoenix, Arizona 85003. By way of brief identification, I have law degrees from the University of Wisconsin and from Yale, and am the author of some ten books and innumerable articles on legal matters, particularly those relating to the Supreme Court. I was a clerk to Mr. Justice Black at the October 1942 term, have been a professor of law at Indiana University and at the Yale Law School, and have taught and lectured frequently on Supreme Court matters broadly throughout the United States. I have been in practice in Phoenix since 1954 and have handled a number of matters at the United States Supreme Court. From time to time I have been a witness before the Senate Judiciary Committee, and with special reference to the matters here involved served from 1960 to 1970 on the Supreme Court's Advisory Committee on Civil Rules and for a number of years thereafter on the Advisory Commission on Appellate Justice; I am presently a member of the Action Commission, sometimes known as the Janofsky Commission, of the American Bar Association.

The subject under discussion here today has been a topic of great concern to many persons, among them The Hon. Clement F. Haynsworth, Jr. of the U. S. Court of Appeals for the Fourth Circuit, and Dean Erwin N. Griswold, now of Jones, Day, Reavis & Pogue.*

*Judge Haynsworth has written extensively on this subject. See Haynsworth, "Improving the Handling of Criminal Cases in the Federal Appellate System," 59 Cornell Law Review 597 (1974); and "A New Court To Improve the Administration of Justice," 59 A.B.A.J. 841 (1973). Dean Griswold has written also. See Griswold, "Rationing Justice--the Supreme Court's Case Load and What the Court Does Not Do," 60 Cornell Law Review 335 (1975). Each of them has read this statement and made his own suggestions, all of which have been adopted. While of course the details of expression are my own, the general views expressed herein are expressed for them as well as for me.

I appear in support of this legislation which I believe to be particularly desirable if considerably broadened in its function, but probably desirable on any basis. In making this comment I take into account H.R. 4762 introduced by Mr. Kastenmeier and others establishing an inter-circuit court with somewhat similar jurisdiction. That jurisdictional concept is fully deserving of very thoughtful consideration; hopefully its jurisdiction may also be broadened as suggested here and by Justice Cameron if that plan should be the one adopted.

The subject of a National Court of Appeals in one form or another has been before the country for at least ten years, and it is time to act. From the seminal work of the Freund Commission through the thoughtful writings of Judge Clement Haynsworth, Dean Erwin Griswold, and Justice James Duke Cameron of the Arizona Supreme Court, a consensus is beginning to emerge; each has presented excellent ideas. I have also spoken in various parts of the United States on this topic and was given the privilege of presiding at a session of the Chief Justices of the State Courts of the United States at which Dean Griswold and Judge Haynsworth spoke on various aspects of this subject.

I believe, as noted, that this Court is highly desirable. I would give it three heads of jurisdiction. I would give it sufficient personnel to handle the anticipated volume of work. I dwell in the balance of my remarks upon the jurisdiction which I believe the Court should have and the reasons for its creation.

In my view, the National Court of Appeals should have two functions and one nonfunction. To pick up the nonfunction first, under no circumstances do I believe that the Court of Appeals should be able to bar the Supreme Court from review of anything. I do not accept the view of some of my friends in this continuing dialogue that any majority whatsoever of the

National Court of Appeals should preclude the possibility of Supreme Court review. On the affirmative side, I believe that the National Court of Appeals should be both a court of exit from the Supreme Court and a court of entry to the Supreme Court. That is, the National Court of Appeals should be able to receive matters referred by the Supreme Court and should also, in a limited number of cases, serve as a fourth tier court to review decisions on the way to the Supreme Court. Because the addition of a fourth tier necessarily adds delay and expense, I would hold this entry jurisdiction to the highly useful. On the court of exit aspect of the matter--the references from the Supreme Court--since no fourth tier is seriously involved, I would comfortably leave the matter entirely to the Supreme Court.

Details follow:

I. The National Court of Appeals as a Court of Exit or Reference.

S. 1529 in § 1271 provides simply that, "The National Court of Appeals shall have jurisdiction of cases referred to it by the Supreme Court." I assume that this means that cases which have come to the Supreme Court, which that Court for whatever reason finds itself unable to handle easily and which nonetheless warrants a national decision, will be referred by it to the National Court of Appeals.

My comment here is brief because Dean Griswold has exhausted this subject and I adopt his views as my own. There are many questions which, within the limited number of cases the Supreme Court can handle, are not Supreme Court worthy and yet ought to be settled quickly on a nationwide basis. For illustration, many questions on the construction of the tax laws, primarily the income tax laws, should not lie without a definitive answer for years while the country waits for conflicts of decision to develop. Those questions ought to be settled for the taxpaying community, for the Treasury, and for the tax bar in

a hurry. The same may be said of countless questions of the interpretation of the statutes.

In addition, we have conflicts now that cannot be resolved. As the country and the litigation docket grows, this is bound to happen more and more. Some at least of those cases should go to the National Court of Appeals. There are other important matters which the Supreme Court cannot handle which warrant national determination.

Most fundamentally, the conflict approach to Supreme Court determination is itself proving unsound. The docket of the Supreme Court is necessarily limited by the volume of work which its personnel can perform at the standard at which they think it wise to perform it.

Conflicts may be relatively trivial. Pushing the Supreme Court into conflict resolution is a useful function, but since every conflict case taken necessarily precludes consideration of other matters, the result may be unfortunate. Specifically in the field of taxation, the Supreme Court is sufficiently consumed in conflict matters which may be minor and technical that it may not have time to reach the genuinely important matters of tax policy as to which there is no conflict. A case may deserve Supreme Court review even though there has been a whole parade of Circuits falling into line, one behind the other. The freedom of the Supreme Court to choose the important case should be increased by relieving it of the duty to dispose of conflict cases which may be of lesser importance.

II. Collateral Attack; Herein the Desperate Need for Finality at the Criminal Law.

As has been well developed by Judge Haynsworth, whose analysis and statistics I accept, the criminal law system works badly because cases are never over. As Justice Clark once observed in a preface to a book of mine, "Sure and undelayed punishment for those who offend the law is the greatest of all

deterrents." We make that punishment unsure and infinitely delayed, at least before the final bell is rung.

The whole subject has been developed by Justice Cameron and Judge Haynsworth. I ask leave to put my thoughts on this aspect of criminal justice administration into some context. As far as I am concerned, and I think so with most of you, we are engaged in a great civil war, testing whether any nation dedicated as is ours to liberty and justice can long endure. I have no sympathies for those who criticize the Speedy Trial Act and lament that civil cases must stand in line while the criminal cases are moving. I have no regrets for those judges who are pushed to precipitate action in last day situations because cases are required by law to move. Of course, it is unfortunate in the extreme to delay the civil litigants, from the auto accident victim to the business contestant or the consumer with a fair complaint. Yet to the householder whose home is broken into, to the woman who is raped in the streets, to the innocent who is murdered as he minds his own business, it is simply not very important that an auto accident case is going to have to wait, sad as this may be. If the exigencies of the law require, as they did a few years ago, that every single division in New York City be taken off civil work and be put into criminal work, then so be it.

According to a GAO report, in the federal courts in 1977 80% of the criminal cases reached trial within 100 days and in the last half of 1979 this was up to 96%; the GAO has rightly said, "The Act has been effective."* No matter what the sacrifice to the rest of the system, a sure and swift criminal justice is the most important value we can deliver.

*Quoted from S. Abrahams, "The Federal Speedy Trial Act," 65 Judicature 41 (1981).

In part this means that some of our refinements need to go. Let me make very clear that this is not to suggest the barbarism of the so-called fair trial accompanied by the inevitable speedy hanging. I have fought my own battles, in favor of the Miranda rule, for example, or against the death sentence. Nonetheless, starting from the unarguable premise of the need for fairness, the views expressed a few years ago by Dean Erwin Griswold on this point are sound. He wrote that when a typical collection of study materials in criminal law consists of four parts criminal procedure to one part substantive criminal law, the system has gotten overly-complicated and overly-precious. For concrete illustration, Anders is a time-consuming, money-costing myth and it ought to go.* The expansion of the law of challenges to the competence of counsel is a game clearly not worth the candle. First we try the defendant, then we try his lawyer, and then we try the judge who tried the lawyer. I am enormously opposed to interruption of criminal cases with interim appeals, decry the spread of Abney** which should be confined to its facts, and line up with Judge Goodwin of the Ninth Circuit in a recent statement to the effect that the way to get on with criminal cases is to get on with them. Continuances should make hens' teeth look common. This country can afford to adhere rigorously to the fundamental premises of the Fourth, Fifth and Sixth Amendments without refining them into a series of endless ceremonials.

This brings me to the precise matter which relates to this bill and as to which this bill can make a contribution.

*Anders v. California, 386 U.S. 738 (1967); this case requires that even where appointed counsel finds an appeal to be "wholly frivolous," he still must file a brief before he withdraws. This makes it almost impossible for an assigned lawyer not to keep going under current conditions.

**Abney v. United States, 431 U.S. 651 (1977) (denial of motion to dismiss criminal case on claim of double jeopardy is a final judgment, appealable when made without abiding the trial of the case.)

This is the topic of collateral attack, under which after a conviction has been affirmed by the state court and even gone to the Supreme Court where certiorari is denied, it is still possible to keep on raising questions about it almost without limits.

Collateral attack on criminal convictions should be cut to the bone. I supported the rule which became Gideon v. Wainwright* for 25 years before it was adopted by the Court, and believe in it absolutely. Collateral attack should be restricted to situations of this sort, to the absolute fundamentals of a fair trial. With the aid of a National Court of Appeals, the mass of superfluous collateral attacks can largely be avoided altogether.

Let me be concrete about the quantity of cases which I am speaking of. In 1980 there were 7,000 collateral attack cases on state convictions in the federal district courts and some thousands survived to the courts of appeal. Many states have been compelled to establish their own collateral attack systems for post-conviction review, and while many of those cases move over into the federal system after the state review is exhausted, undoubtedly a good many of them stop at this phase. However, they have used up state time and energy in the meanwhile. It is impossible to give hard numbers here because the State Center does not have them.

There is another unmergeable limiting factor: In the existing practice, there can be endless repetition of petitions for habeas corpus. Judge Haynsworth advises me that his court has recently seen the 32nd petition from one person. As a use of judicial time, this is simply outrageous.

All of these collateral attacks are fundamental invasions of the concept of res judicata, or the notion that a case should be got over sometime. As is more fully developed by

*372 U.S. 335 (1963) (recognizing a constitutional right to counsel in criminal cases.)

Judge Haynsworth, with detail which I incorporate by reference, this problem arises because when a state court conviction is affirmed by the state supreme court and a petition for certiorari to the United States Supreme Court follows, under the decisions the denial of certiorari by that Court is not res judicata; it does not end the case. It is familiar doctrine that the Supreme Court does not affirm when it denies certiorari but only concludes not to take the case in the light of considerations of its overall importance in relation to the whole docket. This is for a very good reason: the volume of the cases is so great that the Supreme Court could not possibly handle them and in consequence the res judicata element on any federal constitutional questions has been eliminated.

The result is that the prisoner may then start the habeas corpus parade, within the limits of the applicable statutes, in the federal court. In consequence we get, for realistic purposes, an incessant stream of appeals from the state supreme courts to the federal district courts in order to raise constitutional issues. As I have noted, there were 7,000 of those cases in a recent year, plus unnumbered state court collateral attacks. They then start up the ladder all over again.

The vices of this system are serious. First, they burden the federal courts by their very numbers. Second, because of their volume they cannot be seriously considered as in good conscience they should be. Honest matters which may warrant scrupulous attention can get lost in the throng. Third, the process is legitimately degrading and distressing to the state courts. I have heard state judge after state judge complain, and with considerable fairness, that while they do not mind being overruled by the United States Supreme Court, they have legitimate objection to being overruled by one-judge district courts. Indeed, they frequently complain that the overruling

really is by a magistrate. Fourth, and most serious of all, the system totally defeats Justice Clark's objective of finality in the criminal process.

The continuing availability of a forum in which to challenge a conviction may delay unnecessarily the point at which the convicted and the society can accept a verdict and look toward fulfilling the purposes of a criminal sentence. Furthermore, allowing collateral review of convictions long after commission of the crime and the initial adjudication of guilt results in the determination of issues after evidence is no longer available and witnesses have disappeared or forgotten crucial details.

How can these unfortunate results be avoided and at the same time genuine constitutional values be maintained?

The answer is to give the National Court of Appeals jurisdiction with res judicata effect in the state criminal appeals. The Supreme Court, because of limited manpower, cannot in fact give serious review to all these cases, but the National Court of Appeals could if it is given sufficient manpower to do the job. Review at the National Court of Appeals level should be of a comprehensive type; it should be the full scale review advocated by Professor Dan Meador, recently Assistant Attorney General, and fully covered in his writings. Such review can be given res judicata effect and collateral attack thereby be largely brought to an end.

Let me make emphatically clear that there will still be and there still should be collateral attacks. For example, in a Gideon v. Wainwright situation in which the individual did not have counsel, he could not avail himself of the process of appeal. However, the collateral attack jurisdiction should be reserved for those cases which involve, genuinely, matters of constitutional dimension which truly could not be raised on the first round. In consequence, the federal courts will be

able to give conscientious scrutiny to this limited number of cases and at the same time be freed of the endless cycle of aimless reviews.

Proper diminution of collateral attack will, of course, not put an end to the criminal justice problems of the United States; but it will achieve a marked improvement in efficiency and finality, achieve considerable economy in the use of judicial resources, and be the best contribution this Committee is capable of making to the desirable goal of finality in the criminal process.

III: Review of Certain State Court Civil Decisions.

In much of what I have said, I am tracking the views of Justice Cameron of the Arizona Supreme Court as set forth in his monograph on the finality of state court decisions and the proposal for a National Court of Appeals. I follow him particularly in the recommendation that the National Court of Appeals be given jurisdiction in respect to a number of state civil decisions.

A preliminary word: If there is anyone in the United States who thinks that the creation of a court of federal criminal appeals is desirable, I have not met him. The docket unquestionably should have a mix. Under present law, two categories of cases come to the United States Supreme Court from the state courts involving challenges to the validity of state law under the federal constitution. 28 U.S.C. § 1257 provides that final judgment or decrees of the highest court of the state may be reviewed by the Supreme Court on appeal where there is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. The same section provides further for review by certiorari, rather than appeal, where the validity of a

state statute is drawn into question in a state court and the law is invalidated. The National Court of Appeals might well have review on certiorari of the first category of cases, those in which the state law has been challenged and has been held valid by a state court. The cases in which the state law is held unconstitutional might well continue to go, as they do now, by certiorari directly to the Supreme Court. The difference is that the decision as to validity does not change a going system of government so the urgency for finality is a little less than in the case of a decision against validity, where the operation may be stopped.

The advantages of the proposed jurisdiction are twofold. First, these cases will relieve the Supreme Court of the need of taking the first cut at a docket which can be burdensome to it. At this writing, I do not have hard numbers of these cases because the Supreme Court's computer is not programmed to furnish these data; but I believe the group to be significant. Second, this device will enrich the mix of the National Court of Appeals. While a number of reference cases from the Supreme Court will undoubtedly go up with experience, at the beginning it probably will not be very substantial. Putting a civil component into the jurisdiction will take a portion of the curse off the volume of criminal appeals, make it a good court to be on and avoid narrowness of outlook.

CONCLUSION

A National Court of Appeals is needed. As a court of exit from the Supreme Court, it should receive whatever business the Supreme Court wants to send it. As a court of entry to the Supreme Court, it should receive the criminal appeals from the state courts to the extent needed to give finality to those cases, preserving for collateral attack only those matters which genuinely raise constitutional issues which could not have been

raised on the first trial. The court should also relieve the Supreme Court by taking the first look at what are now the appeals from the state courts upholding the constitutionality of state laws. All decisions should be subject to review by certiorari at the Supreme Court.

PREPARED STATEMENT OF JONATHAN ROSE

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Subcommittee on Courts to discuss the Administration's position on the following bills: (1) Senate Bill 1529, to establish a National Court of Appeals; (2) Senate Bill 1531, to eliminate mandatory appellate jurisdiction of the United States Supreme Court; and (3) Senate Bill 1532, to change the Federal Rules of Civil and Criminal Procedure regarding voir dire.

1. S. 1529, to establish a National Court of Appeals

S. 1529 would establish a National Court of Appeals. Its jurisdiction would extend to all matters referred to it by the Supreme Court, and its decisions would be binding on all lower federal courts. While this proposal offers some potential benefits, the Department of Justice believes that these benefits are outweighed by the adverse effects which we fear such a substantial change of our judicial structure might entail.

Proposals to create a National Court of Appeals have been discussed at length during the last ten years. Such proposals were intended to deal with the increasing workload of the Supreme Court and, especially, the burgeoning number of applications for certiorari. The dimensions of the increase can be illustrated by the number of cases on the docket of the Supreme Court. In 1949, there were 867 such cases; in 1980, there were 5,144. This six-fold increase occurred, of course, without any

increase in the number of Justices (although the number of clerks did grow considerably). These statistics created considerable apprehension regarding the ability of the Justices to review adequately all the petitions for certiorari with which they were faced. The distinguished constitutional scholar, Professor Paul A. Freund of the Harvard Law School, has been among the most eloquent advocates of the need for strong action to deal with this situation.^{1/} Others, however (including some members of the Court), have denied the premise that inadequate attention is devoted by the Supreme Court to deciding cases on the merits or to the screening of cases.^{2/}

In 1972, a Committee chaired by Professor Freund issued a report calling for the creation of a National Court of Appeals.^{3/} That proposal differed significantly from the legislation before you today. Under that proposal, the National Court of Appeals was intended to "screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits."^{4/} This proposal evoked considerable opposition in part because it removed from the Supreme Court to a lower decisional level its critical power to screen and thereby determine which cases the nation's highest court would decide.^{5/}

In 1975, a commission chaired by the Honorable Roman L. Hruska proposed creation of a National Court of Appeals similar in structure and powers to that proposed in the current legislation.^{6/} The Hruska Report stated that the purpose of a National Court of Appeals was "to increase the capacity of the federal judicial system for definitive adjudication of issues of national law."^{7/} The desire to increase the capacity of the judicial system was based upon the existence of "inter-circuit conflicts, delay, uncertainty and the burden presently placed upon the Supreme Court to decide cases which are not truly impor-

Note.--Footnotes appear at end of statement.

tant or otherwise not worthy of its resources."^{8/} Senator Hruska's recommendations generated considerable controversy.^{9/}

On December 10, 1975, Senator Hruska introduced Senate Bill 2762, which embodied the recommendations of the Hruska Report. The most significant difference between the court as proposed by Senator Hruska and that envisioned in the current bill is that S. 1529 provides that the National Court of Appeals would have jurisdiction only over cases referred to it by the Supreme Court, while Senator Hruska proposed that the court also have jurisdiction over cases transferred to it by the circuit courts of appeals.

In our view, the National Court of Appeals proposed by S. 1529 would probably help resolve some existing inter-circuit conflicts and might also unburden the Supreme Court of deciding cases of lesser significance. However, we are concerned that the proposed court would inevitably create additional burdens for the Supreme Court.

The new work which would be imposed upon the Supreme Court if the National Court of Appeals were created could be very substantial. A Committee chaired by former Solicitor General Robert H. Bork observed in 1977 that in addition to "simply accepting or declining to accept cases for review, [the Justices] would have to decide whether cases should be reviewed initially by the Supreme Court or referred to the National Court of Appeals. That determination would require considerable study to identify the pivotal issues of cases and to understand their ramifications."^{10/} At present, the Supreme Court has only to decide whether to take a case or not. The additional options created by the existence of the proposed court would require additional and difficult evaluations where the decision now is simply to accept or deny. Requests for review would become substantially more burdensome and time-consuming.

The responsibility to consider petitions for certiorari after the National Court of Appeals has decided a case referred to it would be an added new burden upon the court. As Judge Luther M. Swygert of the Court of Appeals for the Seventh Circuit has noted, denials of certiorari would carry more weight than at present and therefore demand more attention and time:

That a denial of certiorari has not represented a tacit affirmance of a decision is constitutional dogma. That dogma could not apply to a denial of a request for certiorari in a case decided by the National Court on referral. Decisions of the National Court made after referral by the Supreme Court would take on a dimension far different from those rendered by the courts of appeals. A decision not to review such an opinion by the National Court would imply that the Supreme Court not only adopted the result in that case but also tacitly approved the reasoning of the National Court in reaching the result. Will not deciding whether to review under such circumstances increase rather than decrease the burden of the Justices?¹¹

The Supreme Court, in addition, would have to monitor very closely the decisions of the National Court of Appeals to ensure that the latter's opinions were consistent with the philosophy of the higher court. The new court could in certain circumstances even serve to disrupt evolution of legal doctrines favored by the Supreme Court. Guarding against this would constitute an additional new burden on the Court.

Finally, it should be noted that the existence of a National Court of Appeals is likely to generate additional litigation. Litigants would be more likely to seek review of circuit court decisions, because the new Court of Appeals would increase the probability of obtaining review by a higher tribunal. The generation of more litigation would contradict a basic policy goal of Congress and the Administration.

Even if the creation of a National Court of Appeals were to lessen the Supreme Court's workload, the Department of Justice has some serious concerns about the possible impact of the proposed court. As Judge Henry J. Friendly of the Second Circuit stated, establishing such a court would result in the

"diminution of authority and prestige of the present courts of appeals."^{12/} This diminution will certainly make it more difficult to attract and retain judges of the highest stature for such courts. We are especially concerned about this because the cap on pay received by Federal Judges has made it harder than ever to persuade able people to serve. Indeed, the sharing of the Supreme Court's power to interpret the constitution and national law might even tend to dilute the prestige of the Supreme Court itself.

In some areas of law, such as tax and patents, where national uniformity serves important economic planning purposes, the proposed National Court of Appeals could serve a useful and important role in resolving inter-circuit conflicts. Nevertheless, we do not believe that the need for more frequent resolution of inter-circuit conflicts is sufficiently critical at the present time to justify creation of a National Court of Appeals. Wilfred Feinberg, Chief Judge of the Court of Appeals for the Second Circuit, writes that there are "relatively few examples of undecided issues that are important enough to require national resolution without delay."^{13/} There is little evidence that the Supreme Court has refrained from resolving any significant number of inter-circuit conflicts that involve recurring issues or questions of general importance. Moreover, as Professor Charles L. Black, Jr., Henry R. Luce Professor of Jurisprudence of Yale, wrote: "Many cases of such conflict can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings-out in practice of the conflicting rules, particularly where the question of law is a close one, to which confident answer will in any case be impossible."^{14/}

Indeed, much of the confusion currently existing in federal law is not caused by the Supreme Court's inability to address inter-circuit conflicts, but the lack of consensus within

the Supreme Court, which has prevented clear resolution of important legal issues. We fear that the existence of a National Court of Appeals could in some circumstances create more rather than less uncertainty for the lower courts, if its opinions appeared to conflict with the Supreme Court. How, for instance, would a Federal District Court weigh a holding of the National Court of Appeals against conflicting dicta of the Supreme Court?^{15/}

While the Department of Justice is very concerned with the problems which this legislation seeks to address, we have concluded that creation of a National Court of Appeals would be inadvisable at this time. There are preferable ways to lessen the workload of the Supreme Court, such as elimination of mandatory jurisdiction, discussed below.

2. S. 1531, Supreme Court Jurisdiction

S. 1531 would convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for review by certiorari, except in connection with review of decisions by three-judge district courts.^{16/} If enacted, this change would be part of a long, historical process of converting the appellate jurisdiction of the Supreme Court from being totally obligatory to being almost wholly discretionary. The first major effort by Congress to limit the burden of the obligatory functions of the Court was the Circuit Court of Appeals Act of 1891.^{17/} This legislation not only created a new level of courts, but also introduced the concept of discretionary review by certiorari. The burden on the Supreme Court was temporarily improved, but by 1925, long delays in the Court's docket led Chief Justice Taft to urge Congress to enact the Judiciary Act of 1925^{18/}, which greatly expanded certiorari jurisdiction. In the 1970's Congress further converted the Court's remaining obligatory jurisdiction.^{19/}

The Department of Justice believes that the changes

incorporated in this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. Justice Felix Frankfurter elucidated the several reasons that make curtailment of the mandatory appellate jurisdiction of the Supreme Court imperative:

To resolve conflicts among coordinate appellate tribunals and to determine matters of national concern are the essential functions of the Supreme Court. But such issues appear in myriad forms and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment. . . . In marking the boundaries of the Court's jurisdiction its broad categories must be supplemented by ample discretion, permitting review by the Supreme Court in the individual case which reveals a claim fit for decision by the tribunal of last resort. ^{20/}

Chief Justice Burger has endorsed these views in stating that, "all mandatory jurisdiction of the Supreme Court that can be, should be eliminated by statute."^{21/} The Justices have written that they "have spoken out publicly on the issue . . . stating essentially the view that the Court's mandatory jurisdiction should be severely limited or eliminated altogether."^{22/}

The essential defect of the current system is that the Supreme Court is required to devote a large portion of its time deciding cases of no special importance because they qualify for review by appeal under the current statutes. In the 1976 term, for instance, appeals accounted for more than one-fourth of the cases set for oral argument and plenary consideration. Such cases frequently raise no question of general interest and would not warrant the grant of a writ of certiorari.

The current system of mandatory appellate review is the source of a great deal of confusion in the law. The court is required to review hundreds of such appeals on the merits, disposing of many in a summary fashion which often generates confusion because the relative weight to be attached to such decisions is unclear. As Justice Brennan asserted, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question . . . are votes on the merits of the case."^{23/}

However, in Edelman v. Jordan ^{24/} the Court stated that summary affirmances "are not of the same precedential value" as an opinion of the Court "treating the question on the merits." In Hicks v. Miranda,^{25/} the Court stated that a dismissal of a challenge to the constitutionality of a state statute for lack of a substantial federal question is a decision on the merits. The precedential value of such decisions is unclear.^{26/} In Mandel v. Bradley,^{27/} the Court attempted to explain the significance to be attached to summary affirmances. It stated that an affirmance of a lower court decision on appeal affirmed only the judgment, not the reasoning of the lower court. The Court stated that "[t]he precedential significance of the summary action . . . is to be assessed in the light of all the facts in that case."^{28/} Thus the effect of summary dispositions of appeals is still uncertain.^{29/} The proposed legislation would eliminate the problem of determining the precedential value of summary dispositions of obligatory cases.

More importantly, the current system should be changed because it interferes with the resolution of recurrent legal questions of public importance. Mandatory appellate review interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law. The Court should not be required to review cases in circumstances where, for instance, the record in a case presenting an important legal issue may be unclear or the Court's ability to reach a sound decision with respect to a complex and significant issue can be enhanced by examination of subsequent decisions of several lower courts.^{30/} Moreover, the categories defined by the existing appeal provisions encompass broad classes of cases not all of which are of sufficient importance to merit Supreme Court review. The certiorari jurisdiction of the court, on the other hand, results in the review of cases which ought to be decided because of their importance. This point may be appreciated more fully in the context of the principal jurisdictional

provisions that would be affected by S. 1531: 28 U.S.C. Sections 1257(1)-(2), 1254(2), and 1252.

Section 1257(1) authorizes review by appeal of a decision of the highest state court in which a decision could be had where a federal law is found invalid. Section 1257(2) provides similarly for review of decisions by the highest state court where the validity of "a statute of any state" is challenged on federal grounds and upheld.

The purpose of authorizing appeal in such cases is apparently to assure that the supremacy and uniformity of federal law will be upheld. However, there is no reason to believe that the Supreme Court would fail to carry out this responsibility if given discretion to decide which cases should be reviewed in order to vindicate federal interests. In addition, this provision implies that we cannot rely on state courts to reach the proper result in such cases. As the Bork Committee stated, "This residue of implicit distrust has no place in our federal system."^{31/}

Section 1257 does not restrict appeal to cases of general or unusual significance. The term "statute of any state," as used in Section 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances^{32/} and all administrative rules and orders of a "legislative" character.^{33/} Moreover, Dahnke-Walker Milling Co. v. Bondurant,^{34/} holds that this provision does not require that the challenge rejected by the state court be to the general validity of a state law. Appeal to the Supreme Court may be taken even if the application of the state law was barred on federal grounds only in the particular facts of an individual case. In some cases, the ability of a litigant to obtain review on appeal may depend simply on his attorney's ability to describe the outcome of the case as a rejection of a federal constitutional challenge to the validity of a state law as applied.^{35/}

Section 1254(2) authorizes appeal by a party relying on a state statute held by a federal court of appeals to be invalid on federal grounds. The category specified in this provision also does not define a class of cases which are always of special importance. As is the case for Section 1257, a "statute" under this provision includes municipal ordinances^{36/} and administrative orders.^{37/} It suffices if a state law is held to be invalid as applied under the facts of a particular case.^{38/}

Section 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. There is no reason to believe that the Supreme Court would frequently refuse to grant a discretionary noted that in cases in which expedited consideration by the Supreme court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as did the government in United States v. Nixon.^{39/}

Section 6 of the bill deletes Section 310(b) of the Federal Election Campaign Act of 1971 (hereinafter referred to as FECA).^{40/} Section 310(b) currently provides that any district court decision in any action construing the constitutionality of any provision of the FECA "shall be reviewable by appeal directly to the Supreme Court." Deletion of this section would result in actions regarding the constitutionality of any provision of the act being governed by Section 310(a) of the FECA,^{41/} which provides that the district court "immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc."

Provisions for judicial review in the FECA are at present complicated, confusing and inefficient. In addition to Section 310, Section 801 of the FECA ^{42/} provides means of judicial review. Section 801(b)(2)^{43/} states that a three-judge panel of the district court "shall have jurisdiction of proceedings, pursuant to this subsection;" with any appeal lying directly to the Supreme Court, under 28 U.S.C. § 2284. The present structure can result in different courts dealing with aspects of the same case. Judicial economy and consistency in results are best served by providing in the FECA for judicial review by the same courts under the same procedures. Therefore, the Department favors deletion of Section 310(b) of the FECA, but simultaneous amendment of Section 801(b) to conform it to the amended Section 310. In the alternative, the current provisions for a three-judge panel with direct appeal to the Supreme Court in section 801 could be retained only in the most exceptional circumstances, namely actions brought by Presidential candidates, with all other cases handled according to the procedure of the revised Section 310 of the FECA.

We do not believe that alternative broad rules of mandatory review can be devised that will assure consideration of important cases in a principled and consistent way, and still avoid the problems arising under the current system. If the discretionary review set forth in practice proves to be unsatisfactory in particular areas, Congress can restore appellate review to the Supreme Court's jurisdiction.

The proposed measure will entail no additional government costs or expenditures and will permit the Supreme Court to utilize its resources in a more rational manner. For the foregoing reasons, the Department of Justice supports S. 1513, and urges its speedy enactment.

3. S. 1532, Voir Dire Amendments

S. 1532 would alter the present Federal Rules of Civil

and Criminal Procedure relating to voir dire examinations. Such examinations are governed currently by the practically identical provisions of Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a). These rules permit trial judges to conduct the voir dire examinations or to allow counsel to do so. At present, when the voir dire is undertaken by the court, counsel may either engage in such supplemental examination as the court deems proper or submit additional questions for the jury to the court. The scope of counsel's participation in this process is wholly within the discretion of the court under the current rules.

S. 1532 would amend the Rules to require the court to allow counsel to conduct the examination of the prospective jurors. The court could supplement counsel's examination and impose reasonable limitations on voir dire examinations.

The Notes of the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference on Fed. R. Civ. P. 47(a) state that the current rules on voir dire were based on pre-existing practice which had been "found very useful by federal trial judges." The Advisory Committee also thought it desirable to have a uniform federal practice for criminal and civil cases.^{44/} The Department of Justice agrees with both of points.

The Department of Justice is aware of the concerns in the bar regarding the importance of voir dire. Permitting counsel to conduct examination of prospective jurors would likely result in a more thorough examination and could help to assure maximum guarantees against juror bias. However, we do not believe that it would be best to make the changes suggested at this time. Examination of veniremen by counsel would make trials longer; increase the cost to the taxpayer in civil and criminal cases in which the government is a party; and further burden the judicial system. These costs would be incurred even though the present system works well and provides adequate guarantees against juror bias.

The assurance that defendants in criminal trials will receive an impartial hearing before the jury is especially important. Under Fed. R. Crim. P. 24(a) and related case law, a federal criminal defendant is assured of an impartial jury. It has long been recognized that the court's exercise of its traditionally broad discretion over the voir dire, and the restriction of examination by or at the request of counsel, are subject to "the essential demands of fairness."^{45/} The courts must conduct or permit sufficient examination to provide "reasonable assurance that [a prospective juror's] prejudice would be discovered if present,"^{46/} and the courts must also provide a reasonable opportunity for counsel to exercise peremptory challenges in a meaningful way.^{47/} The District of Columbia Circuit has held that "the defense must be given a full and fair opportunity [during voir dire] to expose bias and prejudice on the part of veniremen."^{48/}

Thus in our view the current system provides adequate guarantees of fairness. Moreover, practical considerations strongly support maintaining the traditional federal rule. After conducting a broad study of the federal jury system in 1960, a committee of the Judicial Conference concluded in pertinent part:

The voir dire examination of trial jurors by the judge, together with supplemental examination, at the instance of the parties and counsel, by the judge, as provided by the above quoted rules, results in a great savings of time, and the character of the examination is thereby much improved. The Committee recommends that this practice be followed in all districts.^{49/}

Many commentators agree that the federal method of conducting voir dire yields a substantial savings in time when compared with other methods.^{50/} Some scholars have even criticized voir dire as "a cumbersome, time consuming, meaningless part of the jury trial."^{51/} Chief Justice Burger has called it a "major piece of litigation, consuming days or weeks."^{52/} Moreover, one of the major justifications for court-conducted voir dire is "to remedy the parties' attempt to influence jurors."^{53/}

I have noted that a recent newspaper article reports that jury selection in New York City trials is "out of hand" under a rule entitling lawyers, rather than the judge, to control the voir dire process.^{54/} Jury selection consumes up to a third of total trial time in New York City and is "a major reason for the slow pace of criminal justice."^{55/} The article states that in lawyer-controlled voir dire, counsel aims not only to learn about the jurors, but to "rap with them to warm them to their cause."^{56/} The rule proposed in S. 1532 would enable the court to impose limitations on counsel to prevent such abuses of voir dire. Nevertheless, we are concerned that the suggested change in voir dire could result in a substantial increase in the cost and time of trials in federal court, which cannot be fully justified in light of existing protection against biased jurors. Because we believe that trials are already too time-consuming and expensive, the Department of Justice has concluded that the current system should be retained.

I appreciate very much the opportunity to speak to the Committee about these important bills.

FOOTNOTES

- 1/ See, e.g., Freund, Why We Need the National Court of Appeals, 59 A.B.A.J. 247 (1973); and A National Court of Appeals, 25 Hastings L.J. 1301 (1974).
- 2/ See, e.g., Brennan, The National Court of Appeals: Another Dissent, 40 U. Chi. L. Rev. 473, 475-6 (1973).
- 3/ Federal Judicial Center Report of the Group on the Caseload of the Supreme Court (1972) (Administrative Office, U.S. Courts for Federal Judicial Center, Dec. 1972) (hereinafter cited as Freund Report).
- 4/ Freund Report, supra note 3, at 18.
- 5/ See, e.g., Brennan, supra note 2, at 476. See also Gressman, The Constitution v. The Freund Report, 41 Geo. Wash. L. Rev. 951 (1973); Warren, A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court, 20 Loy. L. Rev. 221 (1974). But see A. Bickel, The Caseload of the Supreme Court (1973); Freund, supra note 1; and Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973).

- 6/ U.S. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), reprinted at 67 F.R.D. 195 (1975) (hereinafter cited as Hruska Report).
- 7/ Hruska Report, supra note 6, at 5, 67 F.R.D. at 208.
- 8/ Id. at 13-14, 67 F.R.D. at 217-18. See also Hruska, The National Court of Appeals: An Analysis of Viewpoints, 9 Creighton L. Rev. 286 (1975), for amplification by Senator Hruska on the reasons why a National Court of Appeals might be desirable.
- 9/ See, e.g., Alsup, Reservations on the Proposal of the Hruska Commission to Establish A National Court of Appeals, 7 U. Tol. L. Rev. 431 (1976); Feinberg, A National Court of Appeals, 42 Brooklyn L. Rev. 611 (1976); Haynesworth, supra note 5, at 840; Owens, The Hruska Commission's Proposed National Court of Appeals, 23 U.C.L.A. L. Rev. 580 (1976). But see Hruska, supra note 8; Levin, Do We Need A New National Court?, 12 Trial 32 (1976); Rosenberg, Enlarging the Federal Courts' Capacity to Settle the National Law, 10 Gonz. L. Rev. 709 (1975).
- 10/ Department of Justice Committee on Revision of the Federal Judicial System, The Needs of Federal Courts at 18 (January 1977) (hereinafter cited as the Bork Report).
- 11/ Swygert, The Proposed National Court of Appeals: A Threat to Judicial Symmetry, 51 Indiana L.J. 327, 330 (1976).
- 12/ Letter of Honorable Henry J. Friendly, Senior Circuit Judge, United States Court of Appeals for the Second Circuit (April 22, 1975), in II Commission on Revision of the Federal Court Appellate System, Hearings, Second Phase, 1974-75, at 1311.
- 13/ Feinberg, supra note 9, at 623.
- 14/ Black, The National Court of Appeals: An Unwise Proposal, 83 Yale L. J. 883, 898 (1974).
- 15/ Alexander Hamilton discussed the need for control of the lower courts by a single Supreme Court during the controversy surrounding adoption of the Constitution:

There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice. The Federalist Papers, No. 22, (A. Hamilton) (New Am. Lib. ed. 1961).
- 16/ In addition to retaining appeals from three-judge district courts, the bill does not eliminate one narrow area of appellate jurisdiction. 45 U.S.C. § 743(d) authorizes direct appeal to the Supreme Court of certain determinations of the special railroad reorganization court. This statute will be unlikely to generate significant amounts of litigation, because the major lawsuits with which that court was created to deal have been settled within the past year.

17/ 26 Stat. 826 (1891).

18/ 43 Stat. 936 (1925).

19/ Legislation adopted in the 1970's that converted the Supreme Court's mandatory jurisdiction includes: revisions in 1970 to the Criminal Appeals Act, 18 U.S.C. 3731 (eliminating direct appeals by the United States from certain types of district court criminal decisions); the Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1974) (eliminating direct appeals in cases under the antitrust laws and the Interstate Commerce Act authorized by the Expediting Act of 1903); and the repeal of 28 U.S.C. 2281 and 2282, which required the convocation of three-judge district courts to hear and determine injunctive challenges to the constitutional validity of State or Federal statutes, 90 Stat. 1119 (1976).

20/ Frankfurter and Landis, *The Business of the Supreme Court*, (1982), pp. 257-258.

21/ Remarks of Chief Justice Burger at American Law Institute meeting, May 20, 1975, cited in H.R. Rep. No. 985, 95th Cong., 2d Sess. 2 (1978).

22/ See Letter from the Justices to Senator DeConcini (June 22, 1978), reprinted in Appendix I, S. Rep. No. 35, 96th Cong., 1st Sess. 15-16 (1979); see also prefatory statements on behalf of the Court of Justice Stevens regarding First Federal Savings and Loan Ass'n of Boston v. Tax Comm'n of Massachusetts, 437 U.S. 255 (1978), and Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978) reprinted in S. Rep. No. 35, 96th Cong., 1st Sess. 17 (1979).

23/ Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959).

24/ 415 U.S. 651, 670-1 (1974).

25/ 422 U.S. 332, 344-5 (1975). The Court noted that, "Ascertaining the reach and content of summary actions may itself present issues of real substance, and in circumstances where the constitutionality of a state statute is at stake, that undertaking itself may be one for a three-judge court." Id. at 345 n.14.

26/ See C. Wright, *Law of Federal Courts* 495 (2d ed. 1970).

27/ 432 U.S. 173 (1977) (per curiam).

28/ Id. at 176-177.

29/ Justice Brennan, in a concurring opinion to Mandel, described the current state of the law:

[I]n my view, the federal and state courts should give "appropriate, but not necessarily conclusive, weight to our summary dispositions," rather than be required . . . "to treat our summary dispositions of appeals as conclusive precedents regarding constitutional challenges to like state statutes or ordinances."

The Court . . . effectively embraces that view, and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice

that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.

Id. at 179-80 (citations omitted) (emphasis added).

- 30/ See Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (Brennan, J., dissenting from denial of certiorari); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., concerning denial of certiorari).
- 31/ Bork Report, supra note 10, at 13.
- 32/ See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); and Jamison v. Texas, 318 U.S. 413 (1943).
- 33/ See, e.g., Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961).
- 34/ 257 U.S. 282 (1921).
- 35/ See Hart & Wechsler, The Federal Courts and the Federal System, 631-40 (2d ed. 1973).
- 36/ City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976).
- 37/ Public Service Comm'n v. Batesville Telephone Co., 284 U.S. 6 (1931).
- 38/ Dutton v. Evans, 400 U.S. 74, 76 n.6 (1970).
- 39/ 418 U.S. 683 (1974).
- 40/ 2 U.S.C. § 437h(b).
- 41/ 2 U.S.C. § 437h(a).
- 42/ 26 U.S.C. § 9011.
- 43/ 26 U.S.C. § 9011(b)(2).
- 44/ See Notes of the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference on Fed. R. Civ. P. 24(a).
- 45/ Aldridge v. United States, 283 U.S. 308, 310 (1931).
- 46/ United States v. Magana-Arevalo, 639 F.2d 226, 229 (5th Cir. 1981).
- 47/ United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977); see also United States v. Baker, 638 F.2d 198 (10th Cir. 1980).
- 48/ United States v. Robinson, 475 F.2d 376, 380-381 (D.C. Cir. 1973). See also Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980), where the court held that the trial court committed prejudicial error by unreasonably restricting the

voir dire examination. The Court stated that defendant Ford was denied the opportunity to inquire into areas which might have uncovered grounds for challenge for cause. Moreover, the defendant was unable to exercise intelligently its peremptory challenges because of the restrictions placed on voir dire by the trial court.

- 49/ The Jury System in Federal Courts, 26 F.R.D. 409, at 467 (1960).
- 50/ Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. Cal. L. Rev. 916 (1971).
- 51/ Ryan and Neeson, Voir Dire: A Trial Technique in Transition, 4 Am. J. of Trial Advocacy 523, 524 n.3 (1981). See also, Craig, Erikson, Friesen & Maxwell, Voir Dire: Criticism and Comment, 47 Den. L.J. 465 (1970); Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loy L.A. L. Rev. 247 (1973); Levit, Nelson, Ball & Chernick, supra note 45.
- 52/ National Conference on the Judiciary, Williamsburg, Virginia, March 12, 1971.
- 53/ Massey and Travis, Voir Dire, 62 Chic. B. Rec. 103, 109 (1980).
- 54/ New York Times, June 17, 1981, at page A30 ("The Editorial Notebook").
- 55/ Id.
- 56/ Id.

Senator HEFLIN. We will next go to the question of the elimination of mandatory jurisdiction. Mr. Ed Cutler of the American Bar Association in Tampa, Fla., is here. We appreciate your presence. If you will go ahead and summarize your testimony, we would be delighted to hear from you.

Again, I am going to have to step out just for a minute. Go ahead. My able aide here will hear every word that you say.

**STATEMENT OF ED CUTLER, ATTORNEY, AMERICAN BAR
ASSOCIATION, TAMPA, FLA.**

Mr. CUTLER. Thank you, Mr. Chairman.

I do want to say this, that it is certainly a privilege to be the sole panelist here, but your statement ought to add greatly. I might have suggested that you might be a fellow witness on this subject, inasmuch as you have already expressed yourself, having studied the subject very thoroughly. I will probably quote you from time to time in the few remarks that I make.

Senator HEFLIN. Well, I never have any objection to that. Go ahead, sir. I will be right back.

Mr. CUTLER. Thank you, sir.

As you have stated, Mr. Chairman, in connection with this bill and other companion bills which you introduced on July 29, the U.S. Supreme Court is being threatened in its effectiveness by the excessively increasing caseload. We of the bar appreciate the opportunity to express ourselves on these issues, and particularly now on the subject of increasing the discretionary jurisdiction of the U.S. Supreme Court.

If the measures proposed in Senate bill 1531 are carried out, the remaining mandatory review by the Supreme Court will be very small indeed. It will deal essentially with the last vestiges of Federal three-judge courts, along with one item which I think is not a three-judge court matter and that deals with railroad reorganization.

Right now, as I understand it, the mandatory review that remains following the constantly growing restrictions on the Supreme Court's mandatory jurisdiction after its first century of existence is only about 10 percent, perhaps less, of the Supreme Court's caseload now. What is proposed here should not be characterized as a judges' relief bill. The purpose is really not to reduce the caseload of the Supreme Court, certainly not materially, because those very appeals which would be eliminated would be substituted by petitions for review, most certainly, by litigants seeking review on the mandatory items that would now be eliminated.

The important thing is that the Supreme Court would be relieved of addressing, as it must, the mandatory appeals in a more thorough or a more absolute fashion than petitions for review. Many of those cases do not really call for determination by the highest court of the land and certainly not in competition with many of the cases which are now presented by petition for review on certiorari and cannot be heard because of the need by the Supreme Court to limit the reviews it grants.

The American Bar Association recommended legislation of this type by resolution in 1979, and this was presented to the Senate

when the debate occurred on the 1979 version of this same kind of legislation. Our association has taken the position, along with almost everyone else, that as far as possible the remaining obligatory jurisdiction of the U.S. Supreme Court should be eliminated.

The three-judge Federal courts certainly need a place for review, and it would be inappropriate as long as we have three-judge Federal courts to have review from three judges—usually two of them coming from the circuit bench—to be reviewed by another panel of three judges from that same circuit bench. Therefore, it is quite appropriate, until we get a national court of appeals or some similar arrangement, to have mandatory appeals from those courts.

In fact, as Senator Heflin has stated, there is no purpose in this legislation to eliminate the right of appeal. In no instance would there be an absence of an appeal either at the State court level or within the courts of appeal of the United States or other appellate courts that still exist in the Federal system. Therefore, any objection that there should always be a right of appeal is an invalid objection.

Now apparently the widespread notion that this is a completely uncontroversial subject is not exactly true, and that is because there is always a lawyer or someone else who will engage in controversy about anything. Although it is not in our written statement, which I understand will be made part of the record, I do want to call attention to the fact that two Senators did in 1979 raise a question on the floor of the full Senate. They were Senators Morgan and McClure, who felt that as far as their States were concerned, the State should have an absolute right of appeal to the U.S. Supreme Court. They were the only voices that were heard in opposition. Of course, they were overwhelmingly overruled by the Senate vote in 1979.

Now there also is one article that our staff has picked up by a professor, reported in—it was in 46 Cincinnati Law Review at page 347—a 1977 issue. Associate professor of law at the University of Wisconsin Mark Tushnet wrote an article thinking that the mandatory jurisdiction of the U.S. Supreme Court should not be eliminated.

However, the judges themselves for once were unanimous in writing a letter to your committee, I believe, or to the Senate saying they supported this kind of legislation. As I say, it is not a matter of a judges' relief bill; it is a matter of trying to put the limited resources of the Supreme Court in better places; namely, those petitions for certiorari which they cannot hear now and could hear if they did not have the mandatory jurisdiction they still have.

There is second reason given, and that is that these dispositions of mandatory appeals by summary proceedings leave a real question about the precedential value of those rulings. As you know, most of the appeals go that way, that is, by summary disposition, and only a relatively small percentage get the full-blown kind of hearing that you would want on an appeal that really ought to go to the Court.

The Court has changed a lot since the first century of its existence. We all enjoy from time to time going back into the old volumes of the U.S. Supreme Court's reports and noting the great

length of time that the court spent in hearing all kinds of cases, the long argument, brilliant, great contributions to the legal literature of this country by eminent counsel, but that cannot be done any more. The Court's load is so dramatically changed, as is shown by the charts that Professor Levin submitted earlier this morning.

Therefore, something should be done to settle the question of the precedential value of these summary affirmances. The best way to do it would be by legislation of this kind. I personally feel the Supreme Court could itself do it, although they deny that they have the ability to settle it, but as of now there is a great controversy still going on as to the effect of summary affirmances in the U.S. Supreme Court.

I have added a third ground which has not been publicly stated before, in my written statement, Mr. Chairman. That is that the experience of appellate lawyers where you have two different kinds of review, such as appeal or writ of error and certiorari, is a difficult one at times because you cannot be sure which is the correct method of appeal. In the State court practice, we have found that some lawyers file both an appeal and a petition for certiorari or the equivalent and then seek to have them combined or have the court decide which one was correct.

As a matter of fact, in the case of some of the statutes which would be repealed under your proposed bill, there are some issues that could only be raised by certiorari and others that could only be raised by appeal, so that in one case you might have more than one issue and two different kinds of review by the Supreme Court in that one case, a little bit comparable to the matter of a patent case where you have antitrust issues and need disposition in that one case by a court that can handle it.

The question of what is the legal consensus, what has the crucible done over the number of years that this has been a pending question, is pretty clear. There is no real issue at all about this kind of legislation, and we are hoping that, in line with the policy of having the U.S. Supreme Court set its own docket, the Congress will be able to enact this bill this year and that there will be no impediment such as occurred in 1979, when something which some of us think was unrelated did prevent that bill from being passed. Essentially I would take that to be a political matter.

Now that that kind of issue is being separately treated by the Congress, I assume that there will be no effort in this Congress to amend this bill. We urgently ask that this be passed in order to increase the effectiveness of the Federal court system and thereby the better delivery of Federal justice.

Senator HEFLIN. Thank you, sir. We appreciate your excellent testimony.

Mr. Velde, do you have any questions?

Mr. VELDE. No questions, Mr. Chairman, just an observation that the Department of Justice in the testimony submitted for the record by Mr. Rose also strongly supported this bill.

Senator HEFLIN. I believe his statement has been made a part of the record.

Mr. VELDE. Yes.

Senator HEFLIN. Thank you, sir. I appreciate it.

[The prepared statement of Mr. Cutler follows:]

PREPARED STATEMENT OF EDWARD I. CUTLER

Thank you, Mr. Chairman, and members of the Subcommittee, for this opportunity to appear before you to present the views of the American Bar Association on legislation to increase the discretionary power of the United States Supreme Court over review of matters heretofore within the obligatory jurisdiction of the Court. On July 29 Senator Heflin, upon introducing Senate Bill 1531 now before you, along with other bills "designed to improve our Federal court system and the administration of justice in America," stressed that such legislation is necessary to meet the overwhelming, burgeoning caseload of the Court, which threatens to undermine the Court's effectiveness in the administration of justice. It is fitting and important that the views of the organized bar be expressed.

My name is Edward I. Cutler, a practicing attorney from Tampa, Florida. I am here today as a representative of the American Bar Association, whose members comprise more than half of the legal profession in the United States and number one-third of all of the lawyers in the world. As we previously emphasized to the Senate Judiciary Subcommittee on the Constitution, in discussing constitutional aspects of other legislation which would affect the Federal judicial system, the American Bar Association is committed to the goal of assuring meaningful access to justice in this country.

This is, I believe, the first time our Association has submitted testimony on the issue of the discretionary versus the obligatory jurisdiction of the Supreme Court of the United States. However, it is not the first time that the American Bar Association has expressed itself on the issue. In February of 1979 our House of Delegates adopted the following Resolution supporting discretionary review of most matters presently reviewable by appeal:

"Be it resolved, that the American Bar Association approves and supports the adoption by the Congress of legislation to abolish obligatory Supreme Court review by appeal, as distinguished from discretionary review by certiorari, of all matters now reviewable by appeal, except for appeals from determinations by three-judge courts."

During the last Congress, when S.450 (Supreme Court Jurisdiction Act of 1979), containing provisions substantially identical to S.1531, was being debated, Senator Thurmond relied in part on the American Bar Association's support of this legislation as reflected in our Resolution.

The reasons for supporting S.1531 have been cited before in connection with the various bills which were introduced on the subject in both the Senate and the House in prior years. May I re-emphasize them now.

Initially, it is clear that appeals in the Federal system, in-

cluding appeals to the Supreme Court, are purely creatures of legislative choice: Heike v. United States, 217 U.S. 428 (1910). They are not mandated by the Constitution. However, to the extent appeals are mandated by legislation, the Court is obliged to consider properly perfected appeals upon their merits. This "obligation" was developed in the early days when ample time existed for hearings, deliberations and opinions upon the merits.

During the first century of the Supreme Court's existence, all cases came to the Court by appeal. However, since 1891, its obligatory jurisdiction has been steadily narrowed. It was tabulated that, during the 1976 term, there were 3,652 cases on the Court's discretionary (certiorari) docket and only 311 cases on its obligatory (appeal) docket. Since then, because of further reductions in three-judge Federal district court matters, the percentage of appeals has continued to decrease. Nevertheless, although the obligatory jurisdiction represents less than ten percent of the Court's total volume, it requires a disproportionate amount of the Court's time even to dispose of them, or most of them, summarily without oral argument. We should all expect this time to be devoted instead to the significant constitutional and other matters of nationwide import which are clogging the Court's calendar. This is a major reason to support the proposed changes.

Secondly, the Court's use of summary dispositions on appeal has developed an unclear picture as to their precedential values. Some lawyers and courts take the position that they are to be treated as precedents equally with opinions rendered on fully argued cases. Others say they are not entitled to such weight. While this controversy could possibly be clarified by the Court on its own, the problem can best be corrected by reducing or altogether eliminating review by appeal.

Thirdly, there can arise the problem of the appropriate procedure to seek review in a given case. From my own observation in handling appellate matters, which I am sure was experienced many times by Senator Heflin during his distinguished service as Chief Justice of the state he represents here, it would be best to have a single unified procedure for all appeals.

I remember at least one occasion when, in our own state practice, it became necessary to file both an appeal and a petition for certiorari to review the same order of a trial court because we could not be sure which procedure was correct under the particular circumstances. This same dilemma, as to whether an appeal or certiorari is the correct procedure, arises before the United States Supreme Court, especially on review from state court decisions. In Federal actions, some issues are reviewable by appeal and some by certiorari. This can happen in the same case having more than a single issue! Even though 28 U.S.C. §2103 permits the Supreme Court to treat an appeal as a petition for certiorari, the appeal papers must comply with certiorari requirements, and sanctions may be imposed for insufficiencies. It would be no surprise to find that the same duplication I have described

has taken place from time to time before the United States Supreme Court. Such "protective" duplication should not be needed.

Fourthly, if the summary disposition procedure on appeal were to be superseded by discretionary review through certiorari, there is a substantial likelihood that some cases which are presently treated as minor, and thus subject to summary jurisdiction, might, upon review in the Court's discretion, be found deserving of greater exploration. If so, they would then have a plenary hearing.

Finally, adoption of this legislation will not as a practical matter deprive any litigant of an appeal.* There will still be appeals under Federal law to the Federal courts of appeals [or other Federal appellate tribunals] and under state law to state appellate courts. As Senator Heflin has previously pointed out (Congressional Record, April 9, 1979, S4155), it gives a litigant an unnecessary second bite of the apple to provide for a further appeal to the United States Supreme Court.

The Court should be able to control its own docket and in its discretion provide further review, by certiorari when appropriate, for such cases in which there has already been an appeal in another court. The public generally, as well as legal professionals, has learned to accept the proposition that our Supreme Court must pick and choose those cases it considers appropriate for the highest court in our land to review. No current public policy or public interest suggests that the present congressional mandates for appellate review by the Court should be preserved, except in those few instances involving three-judge Federal district courts, whose decisions may not be otherwise reviewable by appeal in any other appellate court.

We, therefore, encourage ongoing legislative efforts to eliminate obligatory jurisdiction in all instances when there has been appellate review below, whether in an appellate court of the United States or in a state appellate court. It is our view that legislation practically eliminating the last vestiges of the Court's obligatory jurisdiction will contribute substantially to meaningful access to justice in our Federal court system.

One last thought. It is time that this overdue, noncontroversial judicial reform be enacted. No controversial, non-germane amendments, such as the school prayer amendment which killed this legislation in the last Congress, should be tolerated.

I would hope the subcommittee, full committee and Senate will promptly move S.1531, and that it will soon become law.

*Review under the Federal Election Campaign Act, 20 U.S.C. §437h (b) has already been completed: *Buckley v. Valeo*, 424 U.S.C. (1976). The Alaska pipeline has been constructed, mooted 43 U.S.C. §1652 (d). Since 25 U.S.C. §652 was enacted more than a half of century ago, there have been no appeals under it involving certain California Indian lands.

Senator HEFLIN. Also I would like on my own request to have made a part of this record the legislative analysis of Senate bill 1531 which was made by the Library of Congress, the Congressional Research Service. I would like to acknowledge Mr. Leland Beck for his outstanding efforts in researching and preparing this analysis. Without objection, I would like to make this document a part of the permanent record:

[The above-mentioned analysis of S. 1531 follows:]

MANDATORY APPELLATE JURISDICTION
OF THE
SUPREME COURT OF THE UNITED STATES

The jurisdiction of the Supreme Court of the United States arises in many forms during legal and political debates. The purpose of this Report is to review the jurisdiction of the Court in the sense of the degree of statutory control the Court has over its various dockets and the appeals docket in particular.^{1/} In terms of degree of control, jurisdiction may be divided into mandatory or obligatory on one hand and discretionary on the other. This Report reviews, seriatim, (1) the mandatory appellate jurisdiction of the Court, (2) the procedure under which the mandatory jurisdiction may be invoked; (3) the practice of the Court; (4) the caseload under the mandatory jurisdiction, and (5) the contemporary proposals to alter or abolish the mandatory jurisdiction. The focus of this Report on the details of jurisdiction, procedure and caseload is designed to provide a detailed basis for Congressional consideration of the proposals to alter or abolish mandatory jurisdiction.

^{1/} See, generally, R. Stern and E. Gressman, Supreme Court Practice (Washington: Bureau of National Affairs, 5th ed. 1978); R. Wolfson and P. Kurland, Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States (New York: Matthew Bender & Co., 1951); H. Tayler, Jurisdiction and Procedure of the Supreme Court of the United States (Rochester: Lawyers' Co-Operative Publishing Co., 1905); W. Phillips, Phillips' Statutory Jurisdiction and Practice of the Supreme Court of the United States (New York: Banks and Brothers, 5th ed. 1887).

1. Mandatory Appellate Jurisdiction

The statutory jurisdiction of the United States Supreme Court can be divided into two major structural types: mandatory or obligatory, and discretionary.^{2/} The mandatory or obligatory jurisdiction, the primary subject of this Report, is a specific direction by Congress to the Court that, on the filing of an appeal and docketing of the case, the Supreme Court shall hear and determine the case or controversy. The discretionary jurisdiction of the Court is a direction by Congress that the Court may decide whether the issues raised are sufficiently meritorious to require the Court's review.

There are at least fifteen specific statutory requirements of mandatory or obligatory jurisdiction. Mandatory jurisdiction has historically focused on the question of the constitutionality of federal and state laws, but specific statutes provide for mandatory jurisdiction over certain classes of cases and the interpretation of certain laws. Certiorari jurisdiction generally covers the broad range of federal Constitutional, statutory or treaty interpretation. As will be noted, in many cases of general mandatory jurisdiction, certiorari jurisdiction is provided as an alternative process.

2/ A historic theory of the jurisdiction of the Supreme Court is that no statutory jurisdiction is required: that, in essence, Article III of the Constitution sufficed to grant jurisdiction to the Court created by Congress and denominated the Supreme Court:

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

"The judicial Power shall extend to all Cases, in Law and Equity, Arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to

(a) Inferior federal court decisions in civil actions to which the United States is a party and in which an Act of Congress is held unconstitutional may be brought directly to the Supreme Court for decision under 28 U.S.C. 1252 (1976):

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or

2/ [continued]:

"all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; --between Citizens of different States; --between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make."

See, 3 J. Story, Commentaries on the Constitution of the United States 546 - 626 (Boston: Little Brown, 1833). Compare, Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) (original jurisdiction in Constitution) with Durousseau v. United States, 6 Cranch (10 U.S.) 307 (1810) (appellate jurisdiction statutory). See, Martin v. Hunter's Lessee, 1 Wheat (14 U.S.) 304, 374 (1816). The current discussion, however, need not focus on the origins of the jurisdiction of the Court, for the question of "mandatory jurisdiction", contrasted with "discretionary jurisdiction", is one of the manner in which jurisdiction is exercised. We assume, but state no opinion on, the power of Congress to make the distinction between mandatory and discretionary jurisdiction, as it has done since the founding of the Republic, under the authority to make "regulations" for the Court. See, generally, F. Frankfurter and J. Landis, The Business of the Supreme Court 3 - 54 (Boston: Little Brown, 1928).

any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

Three prerequisites must be met to invoke the appellate jurisdiction of the Court under § 1252: (i) the case must be civil in nature, although this requirement comprehends all cases, including habeas corpus proceedings, which are not criminal, (ii) the case must be one in which the United States, either directly, or through an officer or employee, is the real party in interest,^{3/} and (iii) the judgment must be against the constitutionality of an Act of Congress.^{4/} We should note that any party may take an appeal to the Supreme Court under § 1252; although it would be rare, a successful party in the lower court is entitled to petition for an affirmance of the decision.^{5/} It is

3/ The United States, referred to generically to encompass all of the parties under the statute, does not need to be one of the original parties to the action. The United States must be notified and may intervene whenever the constitutionality of an Act of Congress is called into question. 28 U.S.C. § 2403 (1976). International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243 (1938).

4/ A decision that an Act of Congress is unconstitutional as applied in a given situation suffices to invoke jurisdiction under § 1252. Fleming v. Rhodes, 331 U.S. 100 (1947). However, a decision that an administrative agency has improperly interpreted a statute or applied the statute in an unconstitutional manner will not suffice for the invocation of jurisdiction under § 1252. United States v. Christian Echoes Ministry, 404 U.S. 561 (1971).

5/ Given that the United States is the party, and the decision is against the constitutionality of an Act of Congress, the appropriate remedy would be injunctive relief against the United States and the nationwide application of that injunction would be presumable. Therefore the need for affirmance by the Court would merely remove the possibility of further litigation of other facts before other federal courts under the same Act. However, we can not state that

also important to note that where an appeal is taken under § 1252, the entire case is removed to the Supreme Court, including all subsidiary questions of statutory interpretation and procedure, whether ancillary to the question in issue or otherwise.^{6/}

Invocation of jurisdiction by direct appeal from a district court to the Supreme Court under § 1252, has been rare, at best.^{7/} For the most part, an order striking down an Act of Congress in which the United States is a party will be an order directly appealable to the Court of Appeals whether final, 28 U.S.C. § 1291 (1976), or interlocutory, 28 U.S.C. § 1292 (1976), and further be subject to a petition to the Supreme Court for a writ of certiorari before judgment if such expedition is truly necessary, 28 U.S.C. § 2101 (1976).

5/ [continued]:

this is uniformly the case. See, e.g., INS v. Chadha, 634 F.2d 408 (9th Cir. 1980) *jur. postponed and consolidated*, --- U.S. --- (No. 80-1832, October 5, 1981) (contrasted with the consolidated cases in which main parties appealed and the intervenors petitioned for certiorari). Conceptually, the requirement of an aggrieved party is adversity to the decision below in the Constitutional sense. The limits of the statutory "any party" provisions do not appear to have been constitutionally challenged and must be taken at face value.

6/ So long as the basis for decision in the inferior court was the unconstitutionality of an Act of Congress, all questions in the case can be brought before the Court, "no matter what the contentions of the parties might be as to what its proper basis should have been". United States v. Raines, 362 U.S. 17, 20 (1960). Indeed, the Court has taken a broad view of the requirements of the statute: "this Court's jurisdiction under §1252 in no way depends on whether the district court had jurisdiction." McLucas v. DeChamplain, 421 U.S. 21, 31 - 32 (1975); United States v. American Friends Service Committee, 419 U.S. 7, 12 n. 7 (1974); Flemming v. Nestor, 363 U.S. 603 (1960); United States v. Raines, *supra*, at 27 n. 7.

7/ See, also, Report of the Study Group on the Case Load of the Supreme Court 33 (Washington: Federal Judicial Center, 1972), reprinted at 57 F.R.D. 573, 602 (1972) ("Freund Report"). See, *infra*, at 42, 44 - 45.

Direct appeals from the Courts of Appeals have also been rare until recently.^{8/}

(b) For a substantial period of time the direct appeal provision in § 1252 appeared to be a surplusage of authority since Congress had also mandated that suits to enjoin the operation of an Act of Congress or a State statute on the grounds of unconstitutionality be heard before Three-Judge District Courts, in accord with 28 U.S.C. § 2284 (1976). These decisions, as are all Three-Judge District Court decisions, are directly appealable to the Supreme Court under 28 U.S.C. § 1253 (1976):

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The division of jurisdiction on this basis caused substantial confusion in the District Courts, and the general three-judge district court injunction statute was repealed in 1976.^{9/} Currently the right of appeal is limited to cases under § 1252, and specific cases where Congress has (i) required review by the Three-Judge District Court or (ii) specifically provided for a right of direct appeal from either a district court or court of appeals. These specific statutes require some explanation.

(c) The Federal Elections Campaign Act of 1971, as amended, provides that suits to test the Constitutionality of the Act may be brought by any individual eligible to vote in a Presidential election and provides specific

^{8/} Parker v. Levy, 417 U.S. 733 (1974), appears to have been the first.

^{9/} Pub. L. 94-381, § 1, 90 Stat. 1119, August 12, 1976, repealing 28 U.S.C. § 2282 (1976)

procedures for the exercise of judicial review.^{10/} The Act requires that the District Court immediately certify all questions of constitutionality to the Court of Appeals, and that the Court of Appeals expedite hearing en banc. An appeal may be taken to the Supreme Court from the judgment of the Court of Appeals within twenty (20) days of the judgment.

This provision differs markedly from the general provisions for appeals. First, Congress has provided what may be best characterized as "voter standing" in the District Court, along with standing for the Federal Elections Commission and the political organizations involved. Second, the provision is substantially more restrictive as to who may file the appeal because it does not contain a specific authorization that "any party" may file the appeal, as is found in § 1252 or § 1253, supra. Rather, the lack of such authority would revert procedure to the general requirement that only the aggrieved, or losing, party may file the appeal.^{11/} Additionally, the provision requires that the appeal be filed within 20 days, a substantially shorter period than generally available.^{12/}

(d) Actions brought before the United States District Courts to implement the Presidential Campaign Fund Act, I.R.C. § 9011, as added P.L. 92-178, § 801, 85 Stat. 570, December 10, 1971, as amended, P.L. 93-443, § 404(C)(19) - (21), 88 Stat. 1293, October 15, 1974, as amended, may be appealed directly to the Court. As in the previous provision for the right of direct, mandatory appeal under the FECA, voter standing is provided in the District Court and no specific

^{10/} P.L. 92-225, § 314, as added P.L. 93-443, § 208(a), 88 Stat. 1285, as renumbered § 310.

^{11/} See, generally, Buckley v. Valeo, 424 U.S. 1 (1976).

^{12/} See, infra, pages 22 - 26. It is unclear whether this provision requires filing the notice of appeal in the court below, docketing the appeal in the Court, or both, within the 20 days.

allowance is made for an appeal by any party. However, the District Court is required to proceed under the Three-Judge District Court provisions, 28 U.S.C. § 2284 (1976), and jurisdiction over the appeal therefrom may also be governed by 28 U.S.C. § 1253 (1976), as well as I.R.C. § 901. The governing distinction will be whether the suit is one for injunction based on unconstitutionality: if so, any party may appeal; if not, only the aggrieved, or losing, party may ^{13/} appeal.

(e) Certain California Indian claims filed in the Court of Claims are reviewable by appeal to the Supreme Court. Act of May 18, 1928, c. 624, § 2, 45 Stat. 602, found at 25 U.S.C. § 652 (1976). Insofar as we have been able to determine, no such claims have survived the statutes of limitations included in § 4 of the specified Act.

(f) The constitutionality of the Trans-Alaska Pipeline construction authorization and limitations of judicial review could be tested by direct appeal of a district court judgment. P.L. 93-153, § 203(d), 87 Stat. 584, November 16, 1973, found at 43 U.S.C. § 1652(d) (1976). As the express statute of limitations within the provision specified a bar to filing sixty days after the date of enactment, this provision now appears dormant.

(g) The determination of constitutionality of the so-called Regional Rail Reorganization Act of 1973 by a special three-judge district court specified in the Act is reviewable on direct appeal to the Supreme Court "in the same manner that an injunctive order may be appealed under section 1253 . . ." P.L. 93-236, § 209(e), 87 Stat. 999, January 2, 1974 as amended, found at 45 U.S.C.

^{13/} The procedures under the FECA are complex, as these jurisdictional and procedural requirements illustrate. The fundamental point of reference between these two provisions is that they are, at best, inconsistent.

§ 719(e)(3) (1976, Supp. III 1979). While the reorganization was considered a temporary process, although involving a permanent body, the potential for litigation arising within the ambit of the Special Court, and consequently the potential for litigation raising the constitutionality of the Act, is continuous.^{14/}

(h) Section 21 of the Federal Trade Commission Improvements Act of 1980 provides for Congressional review of Federal Trade Commission final rules. P.L. 96-252, § 21, 94 Stat. 393, May 28, 1980 (uncodified). This "legislative veto" section includes a subsection providing for judicial review of constitutionality and an appeal to the Supreme Court, patterned after § 310 of the Federal Elections Commission Act, discussed in ¶ (c), *supra*. § 21(f), 94 Stat. 395 - 396. One substantial difference between the FECA provision and the FTC Improvements Act is that the latter does not appear to confer any statutory standing; rather the FTC Improvements Act relies on traditional "interested parties" language. Relative recency of the provision, together with the narrow and highly visible scope of the substantive review, indicate that cases may be expected to be had under the procedure, unless the substantive question is otherwise settled.^{15/}

(i) Three provisions of the Civil Rights Act of 1964 contain specific provisions for direct appeals to the Supreme Court from determinations of Three-Judge District Courts. R.S. § 2004, as amended, prohibits discrimination in voting on the basis of race, color or previous condition of servitude. In 1964, current subsection (g) was added requiring that actions brought to enforce the section by the United States in which the Attorney General has requested a

^{14/} See, generally, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

^{15/} See, Chadha v. INS, *supra*, note 5.

finding of a pattern or practice of discrimination be heard by a Three-Judge District Court in accordance with 28 U.S.C. § 2284 (1976), and provides that an appeal shall lie directly to the Supreme Court. R.S. § 2004(h), as added, P.L. 88-352, § 101, 78 Stat. 241, July 2, 1964, as renumbered, P.L. 89-110, § 15, 79 Stat. 445, August 6, 1965, found at 42 U.S.C. § 1971 (1976).

Section 201 of the Civil Rights Act of 1964 entitles all persons to the full and equal enjoyment of public accommodations, and § 202 entitles all persons to be free from discrimination in that enjoyment. Section 203 prohibits interference with that enjoyment. Section 206 authorizes the Attorney General, on reasonable cause, to file a suit for injunctive or other relief. Section 206 provides that the Attorney General may request that a Three-Judge District Court be convened to hear the case if he determines that the suit is of general public importance and an appeal from the final judgment of the Three-Judge District Court specifically lies to the Supreme Court. P.L. 88-352, § 206(b), 78 Stat. 245, July 2, 1964, found at 42 U.S.C. § 2000a-5(b) (1976).

Section 707, after the enumeration of employment discrimination practices which are prohibited in §§ 703 and 704, authorizes the Attorney General [now the Equal Employment Opportunities Commission] to file suits for injunctive or other relief to enforce the equal employment opportunities provisions. If the Attorney General certifies to the district court that the case is of general public interest, the court shall convene a three-judge court of district and circuit judges. Section 707(b) provides that an appeal to the Supreme Court shall lie from the decision of the three-judge court. P.L. 88-352, § 707(b), 78 Stat. 261, July 2, 1964, found at 42 U.S.C. § 2000e-6(b) (1976).

(j) Several voting rights provisions require trial disposition before a Three-Judge District Court but have separate provisions for appeals to the Supreme Court. Section 4(a) of the Voting Rights Act of 1965, as amended, provides that suits brought by States or political subdivisions thereof to challenge the determinations of the Attorney General with regard to the previous use of election tests shall be heard by Three-Judge District Courts under 28 U.S.C. § 2284 (1976). The subsection separately requires that appeals from such courts lie directly to the Supreme Court. P.L. 90-110, § 4(a), 79 Stat. 438, August 6, 1965, as amended, P.L. 91-285, § 2, 84 Stat. 314, 315, June 22, 1970, P.L. 94-73, §§ 101, 201, 202, 203, 206, 89 Stat. 400 - 402, August 6, 1975, found at 42 U.S.C. § 1973b(a) (1976).

Section 5 of the Voting Rights Act provides that declaratory judgment suits brought by a State or political subdivision to determine whether a particular voter qualification, prerequisite, standard, practice or procedure abridges the right to vote, as an alternative to submission to the Attorney General, shall be heard by a Three-Judge District Court in accordance with 28 U.S.C. § 2284 (1976) and specifically provides that an appeal lies to the Supreme Court. P.L. 89-110, § 5, 79 Stat. 439, August 6, 1965, as amended, P.L. 91-285, §§ 2, 5, 84 Stat. 314, 315, June 22, 1970, P.L. 94-73, §§ 204, 206, 405, 89 Stat. 402, 404, August 6, 1975, found at 42 U.S.C. § 1973c(a) (1976).

Section 301 of the Voting Rights Act of 1965, as added by § 6 of the Voting Rights Act Amendments of 1970, as amended, requires the Attorney General to institute such actions as appropriate against the States or political subdivisions to enforce the Twenty-Sixth Amendment to the United States Constitution, prohibiting the denial of the right to vote on the basis of age. The provision

requires a Three-Judge District Court to be empaneled in accordance with 28 U.S.C. § 2284 (1976) and specifically provides for an appeal to lie directly to the Supreme Court. P.L. 89-110, § 310, August 6, 1965, as added, P.L. 91-285, § 6, 84 Stat. 318, June 22, 1970, as amended, P.L. 94-73, § 407, 89 Stat. 405, August 6, 1975, found at 42 U.S.C. § 1973bb(a)(2) (1976).

Section 10 of the Voting Rights Act, as amended, directs the Attorney General to institute actions for injunctive or declaratory relief from the collection of any poll taxes by a State or political subdivision from any eligible voter. Subsection (c) requires that a Three-Judge District Court be empaneled in accordance with 28 U.S.C. § 2284 (1976) and specifically provides for an appeal to lie directly to the Supreme Court. P.L. 89-110, § 10(c), 79 Stat. 442, August 6, 1965, found at 42 U.S.C. § 1973h(c).

Section 204 of the Voting Rights Act, as amended, authorizes the Attorney General to file suit in the appropriate district court to enjoin any State or political subdivision from enacting or seeking to administer any test or device as a prerequisite for voting or undertaking any action to deny the right to vote in violation of the Act. The provision requires that these suits be heard before a Three-Judge District Court in accord with 28 U.S.C. § 2284 (1976) and specifically provides for an appeal to be taken to the Supreme Court. P.L. 89-110, § 204, as added, P.L. 91-285, § 6, 84 Stat. 317, June 22, 1970, as amended, P.L. 94-73, §§ 302, 303, 406, 89 Stat. 403, 405, August 6, 1975, found at 42 U.S.C. § 1973aa-2 (1976).

(k) The so-called Expediting Act, a misnomer among the plethora of such provisions, required specific direct appeals prior to the 1974 Amendments. Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended, Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167; Act of June 9, 1944, c. 239, 58 Stat.

272; Act of June 25, 1948, c. 646, § 17, 62 Stat. 989; Pub. L. 93-528, § 5, 88 Stat. 1709, December 21, 1974, found at 15 U.S.C. § 29 (1976). After the 16/ 1974 Amendments, the provision can no longer be considered mandatory.

16/ The extant so-called Expediting Act requires, in pertinent part:

"(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to [28 U.S.C. §§ 1291, 2107 (1976)]. Any appeal from an interlocutory order entered in any such case shall be taken to the court of appeals pursuant to [28 U.S.C. §§ 1292(a)(1), 2107 (1976)] but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in [28 U.S.C. § 1254(1) (1976)].

"(b) An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days of the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the first instance pursuant to subsection (a) of this section."

The reference to the so-called Sherman Antitrust Act is relatively clear in the statute, Act of July 2, 1890, c. 647, §§ 1 - 7, 26 Stat. 209, as amended, Act of August 17, 1937, c. 690, T. VIII, 50 Stat. 693, Act of July 7, 1955, c. 281, 69 Stat. 282, found at 15 U.S.C. §§ 1 - 7 (1976). The general description of the class of statutes to which this provision applies relegates the application of the provision in most cases to the determination of the Court. Accordingly, with the exception of the Sherman Act we must suggest that this elaborate

We know of no experience under the discretionary framework of the 1974 Amendments. This previously mandatory jurisdiction is now inapplicable; it is mentioned here because of the historical significance and a continuing lack of understanding about the provision.

(1) The Criminal Appeals Act underwent substantial revision in 1971 and the historical parity between civil and criminal cases where the right to a direct appeal when the constitutionality of an act of Congress was called into question was removed. Prior to the 1971 amendments, an appeal could be taken directly to the Supreme Court from a decision or judgment setting aside or dismissing an indictment or information based on the the invalidity of the statute charged. 28 U.S.C. § 3731 (1964, superseded ed.). This provision has the same effect as 28 U.S.C. § 1252 (1964, 1976) in civil cases. The Criminal Appeals Act, however, also contained a substantial number of other rights of appeal to the Supreme Court, all of which were removed in 1971, relegating all criminal appeals of right to the court of appeals. This provision is mentioned here specifically because of the prior parity between civil and criminal cases in which the constitutionality of an Act of Congress was challenged and the

16/ [continued]:

procedure of mandatory review amounts to no more than elliptical statutized procedure for the granting of certiorari before judgment. The choice of the availability of appeal has two elements: (1) the district judge who tries the case must determine that the case is of general importance and issue the certificate, and (2) the Supreme Court must determine to hear the case. Clearly, the district court judge must be persuaded to issue the certificate, but there would appear to be a de minimus procedural presumption that once the certificate has been filed with the Supreme Court and the record called up, the Court should hear and determine the appeal rather than remand it to the Court of Appeals. To construe the statute otherwise would strip it of all vitality. We have included the provision in this review of statutory mandatory jurisdiction only because of the general, but rather inaccurate, perception of the so-called Expediting Act as a mandatory review provision.

decision was against the constitutionality of the Act.

(m) We should also specifically mention the repealed Three-Judge District Court provisions of 28 U.S.C. §§ 2281, 2282 (1976), to which we have previously alluded, which created the premise for § 1253 jurisdiction. Although the statutes have been repealed, there remain several cases which continue under a savings provision of the repealer.

(n) Where a United States Court of Appeals holds a State statute unconstitutional or preempted, the party relying on the state statute may take an appeal to the Supreme Court. 28 U.S.C. § 1254 (2) (1976). This relatively narrow set of circumstances is further constricted by the statutory preclusion of a writ of certiorari. Section 1254 reads, in pertinent part.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

The statute has both broad and narrow features in interpretation. In the broad sense, the statute clearly indicates that a holding that a State statute has merely been preempted by federal law is sufficient to invoke § 1254(2) jurisdiction.^{17/}

Similarly, the "State statute" comprises not only State legislative enactments of general applicability, but special State legislative acts of local applicability, local, county, or municipal ordinances and State administrative regulations, an interpretation which is more comparable to the State

^{17/} See, Minnesota v. Northern States Power Co., 405 U.S. 1035 (1972), affirming 447 F.2d 1143 (8th Cir. 1971)

action doctrine than to specific statutory interpretation.^{18/} On the other hand, the "State statute" must be relied upon for the decision of the Court of Appeals to be appealable to the Supreme Court, and the decision must be free of an independent and adequate state law ground.^{19/} At the same time, the term "State" does not include Puerto Rico.^{20/} This leaves a substantial anomaly: holdings by the United States Court of Appeals for the First Circuit that a "statute" of Puerto Rico is repugnant to the Constitution or preempted by federal law may only be reviewed by writ of certiorari under 28 U.S.C. § 1254(1) (1976). A similar result would appear warranted with regard to the decisions of the United States Court of Appeals for the District of Columbia Circuit that a District of Columbia "statute" was unconstitutional, although the instant case has not arisen.^{21/}

(o) The next major provision for the right of appeal to the Supreme Court

^{18/} See, Williams v. Bruffy, 6 Otto (96 U.S.) 176, 183 (1877); King Manufacturing Co., v. Augusta, 277 U.S. 100, 104 - 105 (1928) (State constitutional and statutory provisions); Chicago v. Atchison, Topeka and Santa Fe R. Co., 357 U.S. 77, 82 (1958); Doran v. Salem Inn, Inc., 422 U.S. 922, 927 n. 2 (1975); City of New Orleans v. Duke, 427 U.S. 297, 301 (1975) (municipal and local ordinances); cf., United States v. Howard, 352 U.S. 212 (1957) (administrative bodies); Dusch v. Davis, 387 U.S. 112 (1967) (State law of local application).

^{19/} If the decision is based on a state law ground, the use of 1254(2) is improper. Public Service Commission v. Batesville Telephone Co. 284 U.S. 6 (1931). The interpretation of the statute as to the scope of the law covered parallels the general requirements in cases on appeal from State courts of last resort, 28 U.S.C. § 1257 (1976) (discussed in part, *infra*, at 17 - 20), that there be no independent and adequate State ground on which to rest the judgment.

^{20/} Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n. 1 (1970); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 - 677 n. 11 (1974). See, *supra*, note 18. Otherwise, Puerto Rico is treated in a manner similar to a State. Compare, e.g. 28 U.S.C. §§ 1257 (appeal and certiorari from State courts of last resort) and 1258 (appeal and certiorari from Supreme Court of Puerto Rico), discussed, *infra*, at 21.

^{21/} Cf., *infra*, note 30.

is the most common and yet, most complex. Appeals from the final courts of review of the various States may be taken to the Supreme Court under circumstances provided in 28 U.S.C. § 1257 (1976):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

The primary elements of this statute do not require discussion beyond the context of the general policies engendered. The "highest court of a State" is often referred to incorrectly as a "state court of last resort" since the highest court in many state systems has discretionary review; therefore, where the court of last resort has issued a denial of review, the case will be subject to appeal.^{22/} Finality is also a prerequisite, as in all cases brought before

^{22/} See, e.g., *Cohens v. Virginia*, 6 Wheat. (14 U.S.) 264, 375 - 376 (1819). This is a more or less common occurrence depending on the structure of a particular state court system and authority of the highest court.

the Court, but the process of determination of finality is more difficult given the variety of State court systems and procedures which must be analyzed.^{23/}

Thus, where a State trial court decision is final because it is not reviewable by a higher court of the State, that judgment will be reviewable under § 1257.

The litigation from the State courts must include a "substantial federal question", a term which will recur in several other contexts. In State courts the federal issue must be raised in accord with the State rules of procedure and subject to State limitations, so long as an adequate opportunity to raise the issue is provided. Any failure to properly frame or present a substantial federal issue is avoided if the State court decision being appealed expressly considers and decides the issue.^{24/} The substantial federal question denominated in § 1257 (1) is whether the validity of a federal statute is drawn into question based on its repugnance to the Constitution, and the decision below is that the statute is unconstitutional. The substantial federal question denominated in § 1257 (2) is whether the validity of a State statute is drawn into question based on its repugnance to the Constitution or preemption by federal law, and

^{23/} The question of finality in cases arising from State court systems can not be effectively analyzed without due concern for the variation of State judicial systems and the powers of State courts of last resort and inferior courts which may have, by statute or practice, gained the status of final resort. For example, Pennsylvania divides its Supreme Court into panels which are generally final. The New York Court of Appeals has discretion to review, and therefore many cases will come from the Supreme Court of New York, Appellate Division, to the United States Supreme Court. Further, the appellate structure in Ohio and Illinois are such that appeals would appear to lie from county courts to the United States Supreme Court if all other jurisdictional requirements are met.

^{24/} See, e.g., *Saltonstall v. Saltonstall*, 276 U.S. 260, 267 (1928) ("We may disregard the ambiguity of the trustees' contention below that the statutes were 'unconstitutional,' in so far as the state court understood that the federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument.").

the decision below is that the statute is constitutional and not preempted.
The complexity of these questions is not here entirely germane.^{25/}

Additionally, as in appeals from the Court of Appeals under § 1254(2) and in review of petitions for certiorari from State courts under § 1257(3), the self-imposed^{26/} doctrine that the decision below be free of an independent and adequate non-federal ground must be established. The question is two fold: (i) whether the decision is based on an independent non-federal or State ground, and (ii) whether that ground is adequate to support the judgment below. Analysis of these two questions has been historically confusing.

The Court will determine the precise ground on which the judgment below rests -- whether federal or State -- in each instance.^{27/} If the State court has expressly relied on both federal and non-federal or State grounds, the Court must inquire whether the non-federal or State ground is both independent and adequate, for if the non-federal or State ground meets both tests, the Court has no jurisdiction.^{28/} At the other extreme, if both a federal and State

^{25/} The Court's substantive decision of whether a substantial federal question has been raised is based upon pleadings of varying quality and shall reappear in terms of the procedure on appeal, the practice of the Court and the statistical implication of the mandatory docket, infra. What suffices as a properly plead substantial federal question, however, is more of a lower court litigative question, observed more in the failure of counsel than in elucidation by the Court.

^{26/} One of the unanswered questions after 190 years of Supreme Court practice is whether the requirement that an independent and adequate non-federal or State ground not exist for the decision below is, in fact, constitutionally based. As the Court has consistently adhered to the view that it will not decide cases in which there is an independent and adequate non-federal or State ground, the question is likely to remain unanswered. See, Herb v. Pitcairn, 324 U.S. 117 (1945) (on certiorari).

^{27/} Black v. Cutter Laboratories, 351 U.S. 292, 297 - 298 (1956).

^{28/} See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

ground are properly raised in the record of the court below, and the foundation of the decision below is ambiguous, the Court will generally assume that the decision below is based upon any independent and adequate non-federal or State ground which can be found; this is a practice presumption that the petitioning party bears the burden of both proceeding and persuading the Court that the decision below is clearly based on federal grounds. Clearly, numerous middle grounds can be identified for argument in jurisdictional statements.^{29/}

Finally, the limited nature of the questions which come under this mandatory jurisdiction must be reiterated. The question of constitutionality of a State statute must be clearly drawn into question and the decision must be in favor its constitutionality. Similarly, the State court must hold a State statute to have not been preempted by federal law, a complex question of the operation of Article VI of the Constitution and the interpretation of federal law. The limited number of instances in which a State court has held a federal statute unconstitutional tends to naturally be limited by the choice of forums by litigants.^{30/}

(p) We have already alluded to the last provision for a direct right of appeal to the Supreme Court to be discussed here. 28 U.S.C. § 1258 (1976) is a parallel to § 1257 and specifically applies to the Supreme Court of Puerto

^{29/} The middle grounds are considered, but not necessarily ranked, in R. Stern and E. Gressman, Supreme Court Practice, supra, note 1, at 230 - 245.

^{30/} Although the District of Columbia Court of Appeals is specifically included in the definition of "highest court of a State", a law applicable only to the District of Columbia passed by Congress or its delegated authority is not a "statute of the United States" for purposes of § 1257(1). Palmore v. United States, 411 U.S. 389 (1973); Key v. Doyle, 434 U.S. 59 (1977).

Rico. Section 1258 (1) and (2) provide specific mandatory jurisdiction in appeals from the Supreme Court of Puerto Rico as can be brought from State Supreme Courts or the District of Columbia Court of Appeals under § 1257.

This catalogue of provisions for mandatory jurisdiction over appeals from various inferior federal courts, State courts rendering final judgments, and other particular courts should not be viewed as exhaustive. Several features suggest the evanescence of provisions, such as paragraph (e), supra, the complexity of others, such as §§ 1252 and 1257(1) and (2), and the ongoing changes which Congress makes in requiring the Court to hear particular cases under particular circumstances, such as paragraphs (c), (d), (h), (k) and (l), supra. In light of the lack of codification or consolidation of many mandatory jurisdiction provisions and the discordant linguistic patterns utilized in the statutes, we are constrained from asserting that this catalogue is complete. For these same reasons, the Court relies on the affirmative pleadings of the parties -- the filing of a notice of appeal in the inferior court and the docketing of an appeal in the Supreme Court -- for the demand that a case being brought be heard as an appeal.

2. Supreme Court Procedure on Appeal

The procedure for taking an appeal is substantially different from the filing of a petition for a writ of certiorari. We outline the procedure for taking an appeal to the Supreme Court in order to define the process in jurisdictional terms.

The notice of appeal from a judgment of a United States court that an Act of Congress is unconstitutional under §§ 1252 or 1253 must be taken within 30 days of the date of the judgment below. 28 U.S.C. § 2101(a) (1976); Rules of the Supreme Court of the United States, Rule 11.2 (November 21, 1980) (hereinafter "Rule"). The notice of appeal must be filed with the Clerk of the federal court from whose judgment the appeal is taken. Rule 10.3. The case must then be docketed in the Supreme Court within 60 days of the date of the notice of appeal to the court below. 28 U.S.C. 2101(a) (1976); Rule 12.1.

The notice of appeal from an interlocutory judgment of a United States District Court in other cases must be filed with that court within 30 days of the date of judgment; notice of appeal from a final judgment of the District Court must be filed with that court within 60 days of the date of judgment. In particular instances (the constitutionality of the Federal Elections Campaign Act of 1971, the implementation of the Presidential Campaign Fund Act, and the constitutionality of the legislative veto provision of the Federal Trade Commission Improvements Act of 1980, *supra*), the notice of appeal must be filed with the district court, and/or the case docketed, within 20 days. In any event, the case must be docketed in the Supreme Court within 90 days of the date of the

judgment from which the appeal is taken. Rule 12.1.

All other civil appeals must be taken and docketed within 90 days of the date of the judgment being appealed. 28 U.S.C. § 2101(c) (1976); Rule 12.1.

Determining the time for filing appeals in criminal cases from state courts has been delegated to the Court by Congress and the Court has conformed the time to the remainder of civil appeals: 90 days to file the appeal and docket the case. 28 U.S.C. § 2101(d) (1976); Rules 11.1, 12.1.

The time for filing the notice of appeal in the court below may not be extended. Rule 11.4. Further, "[t]he Clerk [of the United States Supreme Court] will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed." Rule 12.1. Any Justice of the Court may extend the time for filing a petition for a writ of certiorari, 28 U.S.C. § 2101(c) (1976), or, for good cause, docketing the case, Rule 12.2, for up to 60 days. The allowance of additional time in filing petitions or docketing the case, together with the proscriptions of extending the time of filing a notice of appeal or accepting jurisdictional statements where the notice of appeal was untimely, clearly indicate that the timing of the filing of the notice of appeal is jurisdictional in nature.

Where an appeal is timely filed, the Court's initial review of the jurisdictional statement will be for the purpose of determining jurisdiction. Where an appeal has been improvidently filed and certiorari will otherwise lie, the savings provision of § 2103, mentioned above, provides the Court with a mechanism for avoiding dismissal for want of jurisdiction. If, however, as in criminal cases from state courts, the appeal is timely filed more than 60 days after the date of the judgment below, viz, the date on which a petition for certiorari in

such a case becomes untimely, § 2103 will not provide an alternative means of review. This anomaly is due to the recent conformance of all time requirements for petitions for writs of certiorari in criminal cases at 60 days. Rule 20.1. Previously, the writ was available for only 30 days to review a criminal judgment of a federal court and 90 days to review a criminal judgment of a state court.

The docketing of the case is accomplished by the filing of the jurisdictional statement, together with an appearance of counsel, certificate of process on all other parties and the payment of the docketing fees. Rule 12.3

Where an appeal has been filed and docketed, and a cross-appeal may be brought, the cross-appeal must be docketed within 30 days of the receipt of the jurisdictional statement. Rule 12.4. Jurisdiction over a cross-appeal is relatively limited: it applies only to cases in which the cross-appeal could be filed originally, not where the entire case is brought up by the original appeal or where the original appeal is dependent on the declaration of unconstitutionality of an Act of Congress or State statute, or where the appeal is dependent upon the declaration of State law preemption by federal law. Here again, the savings feature of § 2103 may be utilized to redenominate a cross-appeal as a petition for a writ of certiorari, whenever certiorari would be appropriate, or a petition for writ of certiorari before judgment where certiorari might there be inappropriate.

The record on appeal is required to be filed in the Supreme Court within 60 days after the notice of appeal is filed in cases appealed under §§ 1252 or 1253. 28 U.S.C. § 2101(a) (1976). Otherwise, the record need not be filed with the Court prior to Court action on the jurisdictional statement unless deemed essential to a proper understanding of the case. Rule 13.1.

The filing of the notice of appeal in the lower court and the docketing of the case in the Supreme Court merely sets in motion the process of Court consideration. An appeal may be dismissed by the appellant in the court below prior to docketing of the appeal. Rule 14.1. Upon agreement of the parties, and satisfaction of any fees owing and costs, at any stage of the proceedings, the Clerk may enter an order of dismissal. Rule 53.

In proceeding further with a live case or controversy, the appellee may file a motion to dismiss, a motion to affirm, or, where appropriate, a motion in alternative form, within 30 days of receipt of the jurisdictional statement, subject to enlargement. Rule 16.1. Rule 16.1 illuminates the variables which are contemplated within the motion to dismiss or affirm:

"(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

"(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised or was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

"(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of cause depends are so unsubstantial as not to need further argument.

"(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument."

The process of appeal may be considered essentially complete upon the filing of the response to the jurisdictional statement, for at that time, both appellant and appellee have filed with the Court not only the questions of jurisdictional

authority, but at least a synopsis of the merits of the cause, although this is a matter of practice, not law. Through the motion to dismiss or affirm, the Court is presented with the countervailing arguments which enable it to make basic decisions on the case. It is to the manner in which the pleadings present the jurisdiction and merits, and how the Court considers its mandatory docket that we now turn.

3. The Practice of the Court

Upon receipt of the motion to dismiss or affirm, or a waiver of the right to file a motion to dismiss or affirm, the Clerk of the Court distributes the jurisdictional statement and the motion to dismiss or affirm to the Justices. Rule 16.4. While a reply to the motion to dismiss or affirm may be filed by the appellant, the Court will not delay consideration of the jurisdictional statement or the motion to dismiss or affirm pending such a filing. Rule 16.5 Where the appellee has filed a cross-appeal or a cross-petition, the distribution of the jurisdictional statement, the motion to dismiss or affirm and the jurisdictional statement on the cross appeal will be delayed until the motion to dismiss or affirm to the jurisdictional statement on the cross-appeal is received. Rule 16.4.

Rule 16 indicates the next action which the Court will take based on the jurisdictional statement and the motion to dismiss or affirm:

"7 After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. . . .

"8 If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction."

Rule 16.7 speaks specifically of the procedure which the Court will follow.

The Rule does not indicate the practice of the Court that appeals are routinely included on the list of cases to be discussed at the Court's Conference, whereas

petitions for certiorari are included only at the behest of any Justice. Rule 16.7 specifically states that the Court may dispose of the case on the merits at this juncture. However, before reaching the implications of that process, we first consider the question of what factors animate the Court's decision under the Rule.

The Court has avoided official comment on the process of determining the appropriate disposition of appeals in all but a few instances, and these are not particularly illustrative. For the most part, the Court's internal practice of handling the mandatory jurisdiction comes from a careful study of the entirety of the docket, rather than opinions filed in the disposition of cases.

No specific process or means of determination by the Court are required by statute in any case before the Court, save the hortatory requirements of expedition in several statutes. The most cogent statement from the bench illuminates the internal procedure for deciding on the means of disposition of an appeal, that is, whether to dispose of the appeal on the pleadings or after fuller briefing and oral argument. In Eaton v. Price,^{31/} the Court was badly divided over the application of a previous holding, itself the product of the narrowest of majorities, 5 to 4. Justice Brennan's candid statement of the determination which the Court makes on the jurisdictional statement and the motion to dismiss or affirm bears substantial repetition:

"The Court's practice, when considering a jurisdictional statement whereby a litigant attempts to invoke the Court's jurisdiction on appeal, is quite similar to its well-known one on applications for writs of certiorari. That is, if four Justices or more are of the opinion that the questions presented by the

^{31/} 360 U.S. 246 (1959).

appeal should be fully briefed and argued orally, an order noting probable jurisdiction or postponing further consideration of the jurisdictional questions to a hearing on the merits is entered. Even though this action is taken on the votes of only a minority of four of the Justices, the Court then approaches plenary consideration of the case anew as a Court; votes previously cast in Conference that the judgment of the court appealed from be summarily affirmed, or that the appeal be dismissed for want of a substantial federal question do not conclude the Justices casting them, and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. Because of this, disagreeing Justices do not ordinarily make a public notation, when an order setting an appeal for argument is entered, that they would have summarily affirmed the judgment below, or have dismissed the appeal from it for want of a substantial federal question. . . . 32/

A response filed by the Justices believing the appeal was controlled by the prior decision speaks only to that prior decision and the perceived effect of setting Eaton for oral argument as a reconsideration of the prior decision. From this singular statement, together with the ongoing perceptions and understandings of the Supreme Court Bar, it seems clear today that the Rule of Four controls setting a case for plenary briefing and oral argument. 33/ The Rule of Four merely sets the stage for how the Court will reach a conclusion on the case, even though the failure of four Justices to agree to full briefing and

32/ 360 U.S. at 246 - 247.

33/ The Rule of Four being a "minority rule" there is the possibility that a majority of the Court may take the more formidable step of disposing of the case on the pleadings. However, at least in considering a dismissal of certiorari as improvidently granted, the Rule of Four would be meaningless if a majority of five could proceed to the summary disposition. Therefore, the internal practice of the Court includes a courtesy that the Rule of Four will not be overruled unless one of the Justices who voted to set the case for argument thereafter recedes and would dismiss certiorari. See, Burrell v. McCray, 426 U.S. 471 (1976) (Stevens, J., concurring; Brennan, J., dissenting); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183 (1959); Rice v. Souix City Cemetary, 349 U.S. 70, 73 (1955); Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 559 - 562 (1957) (Harlan, J., concurring and dissenting); United States v. Shannon, 342 U.S. 288, 294, 298 (1952) (Douglas, J., dissenting).

oral argument does not dispose of the matter. The process of reaching the decision on whether to set a case for oral argument includes the consideration of many variables.

The threshold question is whether the pleadings properly assert mandatory appellate jurisdiction. If the papers improperly assert mandatory jurisdiction the Court will review the question of whether the papers may properly be treated as a petition for a writ of certiorari in accord with 28 U.S.C. § 2103 (1976). If the primary and dependent questions are answered in the negative, the appeal will be "dismissed for want of jurisdiction". If the primary question is answered in the negative and the dependent question is answered in the affirmative, the Court will then consider whether to grant certiorari.^{34/}

The foremost question of the substantiality of the federal issues, assuming the prerequisites of a final judgment, a lack of an independent and adequate non-federal or State ground, and proper presentation, has not been formally addressed by the Court. The limitation on briefing and oral argument to those cases in which a substantial federal question is present can be traced as far back as the early 1900's.^{35/}

Perhaps the most cited off the bench comment on the mandatory jurisdiction of the Court comes from Chief Justice Warren during the proceedings of the

^{34/} In light of the discussion which follows, the answer to the question of whether to grant certiorari is also usually negative. Accordingly, the complex order is frequently rendered: "The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." Granting of certiorari after dismissal of an appeal is not unknown. See, e.g., Palmore v. United States, *supra*, note 30 (appeal dismissed, certiorari granted in part).

^{35/} E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1904).

American Law Institute in 1954:

"It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider substantiality in light of prior decisions, the appeal will be dismissed without opportunity for oral argument."^{35/}

This quotation, however, has lead to confusion on the subject since it seems to place the question of "substantiality" before the formal question of jurisdiction. The thought processes of the Justices, unless they provide some formal opinion on the subject, are likely to remain unknown. As Professor Mishkin has reiterated:

"In ruling on substantiality on an appeal, the Court cannot avoid an appraisal of the merits. 'Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.' Ohio ex rel. Eaton v. Price, [supra]. The discretionary element involved, as least in theory, goes only to the question of the need for or utility of further argument. And ruling on that point would be disciplined by the consideration that dismissal or affirmance denies a full hearing in a case where Congress had not made review discretionary and represents adjudication, not refusal to adjudicate."^{36/}

The distinction between the jurisdiction of the Court and the degree to which the Court will require briefing on the issues presented is thus one subject to substantial debate, but limited by the historic development of the written brief and the decline in the use of oral argument generally. This development has lead to the substantial practice by counsel, although not mandated or even

^{35/} Address of Chief Justice Earl Warren, American Law Institute (May 19, 1954), quoted in Wiener, "The Supreme Court's New Rules" 68 Harv. L. Rev. 20, 51 (1954).

^{36/} P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System (Mineola: Foundation Press, 1973) at 649.

suggested by the Rules, of making two arguments in the jurisdictional statement and the motion to dismiss or affirm: (i) the jurisdiction of the Court and the substantiality of the federal questions presented (Rule 15.1(e) - (g)), and (ii) the merits of the claim.

Justice, then Professor, Frankfurter once noted the general existence of discretion in the mandatory appellate docket:

"Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of the docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings, the administration of [Rule 16] operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari."

37/

The invocation of the factors which will lead to the granting of certiorari in determining whether full briefing and oral argument will be granted represents perhaps the only substantive indication of what the Court looks for in determining the process for the appeal. The factors which the Court will consider in this light periodically change with the Rules, but current Rule 17.1 provides:

"A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a

37/ F. Frankfurter and J. Landis, "The Business of the Supreme Court at October Term, 1929" 44 Harv. L. Rev. 1, 12 - 14 (1930).

state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

To an extent these factors are redundant with the decision made by Congress in determining that particular classes of cases or claims should be adjudicated by the Supreme Court as a matter of right, rather than by leave of the Court; the saving difference is the application of these standards to particular cases, pleadings and facts as contrasted with the Congressional determination on the basis of policy. General (statutory) importance contrasts with particular (case) importance, often in terms of the scope of rights adjudged, effect of the decision on not only parties but the general public, and even the monetary value of the judgment where that value is unusually high. Conflicts among the judgments of courts which will become final unless review is granted is a particularly important factor, given that only the Supreme Court can provide a nationwide uniformity of federal law, with the exception of injunctions against the federal government, and given the increase in the number of inferior courts which must be supervised.^{38/} It seems clear that the Court is particularly

^{38/} I.e., the reorganization of the Fifth Circuit Court of Appeals into the Fifth and Eleventh Circuit Courts of Appeal. Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1994, October 14, 1980.

mindful of the conflicts and importance factors in the process of determining the extent of briefing and oral argument required to reach a decision.

If we make the assumption of the two-tiered decision making process, it follows, both from the assumption and the conventional wisdom on the provision of an appeal of right, that the summary disposition of appeals are all on the merits. That is to say, summary affirmances, summary dismissals, remands, and dismissals for want of a substantial federal question are conclusive adjudications of the merits of the case. The assumption and the conventional wisdom have both received substantial reconsideration.^{39/} The problem, in part, is the lack of formal opinion of the Court in cases of summary disposition, depriving the lower courts of any effective guides as to the meaning of the summary disposition. Similarly the lack of explanation of the summary disposition does not provide the bar with guidance as to what cases and what arguments can more profitably be expected. At bottom, the lack of full briefing and oral argument of the case, mitigated by the dual purpose jurisdictional statement and motion to affirm or dismiss, raises a question in the minds of academics, judges and members of the bar as to how clear the Court was on the issues presented and the precedent pro and con. Without a more fundamentally complete process of adjudication than provided in summary dispositions, there is a substantial aversion to perceiving a decision as "on the merits" and fully dispositive of the issues presented.

Quite to the contrary, the presentation of the motion to affirm or dismiss

^{39/} See, J. Simpson, "Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court" 6 Hastings Con. L. Q. 297, 320 - 328 (1978) and material cited therein.

provides an ample opportunity for the Court to rely on the pleadings and utilize the motion to the end of disposition of the case.

The Court clearly indicated in Hicks v. Miranda that summary affirmances of inferior federal court decisions and dismissals for want of a substantial federal question of the final judgments appealed from State courts were adjudications on the merits which bind the inferior federal courts, but this requirement is limited to the particular parties and facts adjudicated below as pointed out in Mandel v. Bradley.^{40/} As Chief Justice Burger noted in concurrence with the Court in Fusari v. Steinberg, "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."^{41/} In effect, the Court consistently asserts that the summary affirmance is a meritorious disposition which must be respected, but, given that there is no rationale for the disposition, the precedential value is limited to the cases which fall "four square" in line with the summary affirmance. As Robert Stern and Eugene Gressman have noted in the most formidable volume on practice before the Court:

"When the Court feels that the decision below is correct and that no substantial question on the merits has been raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court 'for want of a substantial federal question.' Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition

^{40/} 422 U.S. 332, 342 - 348 (1975); 432 U.S. 173, 176 - 177 (1977).

^{41/} 419 U.S. 379, 391 - 392 (1975) (footnote omitted).

is that the decision below is correct. But if the bar fully understands that 'dismissed for want of a substantial federal question' in a state court appeal is the equivalent of affirmance on the merits insofar as the federal questions under . . . § 1257(1) and (2) are concerned, and is not limited to determination of whether there is such a federal question, the difference in nomenclature does no harm."

42/

Historical differences in both the jurisdictional statutes and the Rules concerning appeals from State and federal courts have all but disappeared, but the Court itself appears to consider the distinction to carry a difference, if only historical.^{43/} Whatever the value of the distinction, the Court has made clear that, within the limited sphere of facts and law directly on point, summary affirmances and dismissals for want of a substantial federal question have binding precedential effect.

Summary vacation and remand are on the merits due to the alteration of the parties' postures with regard to the litigated claims. Limited precedential value is here assumed due to the lack of opinion and rationale to guide the courts, but not necessarily a repudiation of the entire reasoning of the court below.

All other orders have only limited, procedural effect on the case at bar. A dismissal for want of jurisdiction, where certiorari otherwise would not lie, or the bifurcated order dismissing the appeal for want of jurisdiction and denying certiorari, are generally considered to have no precedential value at all.

^{42/} R. Stern and E. Gressman, Supreme Court Practice, *supra*, note 1, at 377 - 378.

^{43/} E.g., Morris v. Mathers, --- U.S. ---, 50 U.S.L.W. 3300 (No. 81-240, October 19, 1981). ("The order dismissing the appeal for want of a substantial federal question is hereby vacated. The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.").

although in certain instances denials of certiorari may leave further avenues of litigation open and certain arguments can be made from patterns of certiorari denials.

In sum, the Court considers all appeals in conference. The factors which the Court considers in determining whether to set the appeal for full briefing and oral argument, the conventional wisdom holds, are quite similar to those which the Court considers in determining to take a case on writ of certiorari. Affirmances of inferior federal court decisions and dismissals of appeals from judgments of state courts for "want of a substantial federal question" have limited precedential effect. Other dismissals of appeals have no effect substantively save that which the Court may specifically attach to the order.

4. The Caseload and Mandatory Jurisdiction

During the 1980 Term, the Court acted on and disposed of a total of 4,360 cases: 2,326 fees paid matters, 2,027 in forma pauperis matters and 7 original matters.^{44/} Of these 4,360 cases, 264 cases became available for argument, of which 154 were argued and decided. In short, of the cases disposed of by the Court, less than 4% were fully briefed and argued before a decision was reached.

The distinction between disposition of appeals and writs of certiorari is not statistically recorded by the Court. This distinction is made in the Term end review of the Solicitor General and is replicated in Table 1 on the following page.^{45/} Over the course of the last five years, with due regard for the repeal

^{44/} The Clerk of the Court prepares a statistical recapitulation of cases handled by the Court after each three week session of the Court and at the end of each Term. The 1980 Term convened on October 6, 1980 and was adjourned on October 5, 1981, the commencement of the 1981 Term. The statistical recapitulation for the 1980 Term, without distinction between the mandatory or discretionary jurisdiction, but rather whether the fees of the Court were paid or waived, is the basis for these statistics. Reprinted at 50 U.S.L.W. 3044 (August 11, 1981).

Generally, it is necessary to discuss either cases which were docketed during a Term and subsequently disposed, or cases which were disposed during a given Term. The process of the Court and the general limitations imposed by the time consumed in preparing a case for initial consideration by the Court after docketing, and the time required to bring a case forward through briefing, oral argument and decision on the merits, carry many cases from one Term to the next. At the commencement of the 1980 Term, 970 cases were carried over from the 1979 Term. At adjournment of the 1980 Term, 786 cases were carried over to the 1981 Term. Because of the carry over factor, and the delay in disposition, the statistics in this Report are based on cases disposed of by the Court during the Term. This allows the statistics to be as complete as possible, as well as being as current as possible.

^{45/} *Infra*, Table 1, note *.

Table 1
SUPREME COURT CASELOAD
BY TYPE OF JURISDICTION
OF DISPOSITION

	October Term 1980	October Term 1979	October Term 1978	October Term 1977	October Term 1976
1. Appeals*	178 4 %	170 4 %	187 5 %	195 5 %	260 7 %
2. Certiorari	4097 94 %	3648 93 %	3762 93 %	3664 93 %	3790 92 %
3. Miscellaneous Docket - Original Writs	71 2 %	71 2 %	64 2 %	77 2 %	53 1 %
4. Original	12 -	13 -	16 -	8 -	6 -
5. Certifications	2 -	0 -	0 -	0 -	0 -
6. TOTAL	4360	3902	4030	3944	4109

* October Term - 1980 statistics provided by the Office of the Solicitor General, United States Department of Justice. October Term - 1979 through October Term - 1976 statistics: U. S. Attorney General, The Annual Report of the Attorney General of the United States 1980 (Washington: U.S.G.P.O. 1981) at 7. The number of appeals shown for the 1980 Term in this table and Table 2 differ because of disagreement over the proper methods for accounting for several classes of complex orders.

of the general Three-Judge District Court provisions,^{46/} the percentage of cases disposed of by the Court as appeals has remained relatively constant as compared to the dispositions on certiorari and the total docket. For the 1980 Term, the Court disposed of 178 appeals,^{47/} representing 4.08% of the entire docket dispositions. We should note, however, the Solicitor General counts dismissals of appeals with consideration of the papers as petitions for certiorari in accord with § 2103, and denying certiorari in the same case as a disposition on writ of certiorari. We would suggest that § 2103 is a procedural requirement which affords the Court the opportunity to avoid dismissal of improperly plead cases and does not create a separate disposition. Accordingly, we feel that the certiorari denied statistic is slightly inflated. However, in those rare cases in which an appeal is improperly taken and therefore dismissed, and the Court subsequently grants certiorari,^{48/} the statistical accounting would require a separate reflection of that event. This does not appear to have happened during the Term according to our own reading of the Supreme Court's Journal. With this dispute noted, we believe the true reflection of the number of appeals disposed of by the Court, after the removal of duplicate or complex dispositions, would be 4.15% of the docket dispositions.

The disposition of appeals, within the universe of the mandatory or obligatory docket itself, provides more insight into how the Court treats the

^{46/} *Supra*, note 9. See, also, the Freund Report, *supra*, note 7.

^{47/} The decision for inclusion or exclusion from this number is subject to some debate; our figures differ at 195 summary dispositions, whether on jurisdiction or the merits. We have attempted to keep the tables internally consistent.

^{48/} *Supra*, *Palmore v. United States*, *supra*, note 30.

mandatory jurisdiction than a comparison of dispositions based on the mandatory and discretionary dockets. The statistics for this internal analysis have been developed by reviewing the Journal of the Supreme Court for the entire 1980 Term, the same method utilized by the Solicitor General in developing statistics on disposition by the type of jurisdiction and governmental participation before the Court. Table 2, on the following page, illustrates the types and numbers of dispositions.

Appeals from State courts under § 1257 (1) or, more likely, (2) clearly predominate the mandatory appellate docket (68.72%).^{49/} Of State court judgments appealed to the Supreme Court, only 3 (2.04%) were summarily vacated and remanded to the State courts issuing the judgment, and in each case the vacation and remand was in light of a recent decision of the Court.^{50/} On the other hand, the Court took jurisdiction and dismissed the appeals for want of a substantial federal question in 80 cases (53.69%).^{51/} Taking as a given the limited sphere of precedential value, the rate of "affirmance" remains remarkably higher than is generally the case.^{52/}

Sixteen appeals (10.74% of appeals from State courts) were dismissed for want of jurisdiction in situations in which the issuance of a writ of certiorari

^{49/} We found no summary dispositions of appeals from the Supreme Court of Puerto Rico under § 1258.

^{50/} Nos. 79-1862, 80-6280 and 80-1797.

^{51/} As we have noted, this is, in essence, an affirmation of the judgment of the State court, but not necessarily the rationale underlying that judgment.

^{52/} The Court generally reverses approximately 65% of the cases it orders fully briefed and argued.

Table 2.

SUMMARY OF SUPREME COURT DISPOSITIONS OF APPEALS
WITHOUT FULL OPINIONS ON THE MERITS
October Term - 1980

[Appeals Disposed: (n) = 195] [-----] [Appeals-Disposed:] [Off Merits (n') = 99 (1,2,6)] [Summarily (n") = 96 (3,4,5)]	All State Courts	United States Courts of Appeal	United States District Courts
1. Appeal Dismissed for Want of Jurisdiction	16*	1	9
2. Appeal Dismissed for Want of Jurisdiction; Treating the Papers filed as a Petition for a Writ of Certiorari; Certiorari Denied	47	21	2
3. Appeal Dismissed for Want of a Substantial Federal Question	80	**	**
4. Judgment of Lower Court Summarily Affirmed	**	4	4
5. Judgment of Lower Court Summarily Vacated and Remanded	3	3	2
6. Appeal Dismissed After Oral Argument	3°	0	0

* Includes two appeals dismissed on the basis of Independent and Adequate State Grounds to Support the Judgment, and four appeals dismissed for failure to Properly Present a Federal Question. These are jurisdictional in nature and do not go to the merits.

** See, supra, at 35 - 36.

° Includes two appeals dismissed for failure to Properly Present a Federal Question and one appeal dismissed for Lack of a Final Judgment. These are jurisdictional in nature and do not go to the merits.

would have been improper, vitiating any consideration of § 2103.^{53/} In 47 appeals (31.54% of appeals from State courts) the Court completed the complex task of determining that it did not have jurisdiction over the appeal under § 1257, dismissed the appeal, considered the papers whereby the appeal was taken as a petition for certiorari in accord with the strictures of § 2103, and denied certiorari.^{54/} Finally, three appeals (2.01% of appeals from State courts) required the plenary review of the Court before it could be determined that the appeal should be dismissed for want of jurisdiction; that is to say, the Court having taken jurisdiction to determine jurisdiction, later determined that the appeal was improperly before it.^{55/} Where further consideration, and the full exposition of the facts and issues of law in the briefs and at oral argument, illuminate the lack of a final judgment where the jurisdictional statement implies finality or the failure of counsel to properly present the federal question in the lower court, as in these cases, the Court will issue a per curiam judgment of dismissal. Such a state of a record below is not common, but, at the same time, incompleteness on closer examination where facial completeness appears is not surprising given the wide variance in State court organization and procedure.

We should also note that the Court disposed of 11 appeals from State courts

^{53/} See, note * of Table 2.

^{54/} We do not suggest that this is as onerous as it may sound. All appeals are placed on the Court's discussion list for the first Conference after the motion to dismiss or affirm, or a waiver is filed, or becomes untimely. The Court, based on the timing, appears to differentiate the aspects of the process, but the consideration and disposition could well, and may, be completed in a single Conference.

^{55/} See, note ° of Table 2.

after full consideration and on the merits of the appeal. In so far as we can determine, in 41.25% of all appeals from State courts decided or disposed of by the Court during the 1980 Term, appellant erred in understanding the Court's mandatory appellate jurisdiction and bringing the appeal.^{56/}

Most appeals brought from the United States Courts of Appeals which are dismissed for want of jurisdiction, whether outright or with consideration of certiorari under § 2103, appear to arise under § 1254(2). Similarly, all summary affirmances and vacation and remands to the Courts of Appeals were initially filed under § 1254(2). The technical aspects of § 1254(2) jurisdiction pose considerable interpretive problems: if the six dispositions of appeals from the Courts of Appeals on the merits after full briefing and a ^{ument} are included to complete the universe of appeals disposed of by the Court from the Courts of Appeals, appellant appears to have erred as to the jurisdiction of the Court in 62.86% of the disposed appeals.

Summary disposition of appeals from United States District Courts are much more specific and include several which were clearly frivolous.^{57/} Of the nine

^{56/} To say that "counsel" erred would be somewhat misleading in these cases. One appellant, proceeding in forma pauperis and pro se, had eight appeals dismissed during the 1980 Term: two appeals from State courts dismissed for want of jurisdiction together with consideration of the papers under § 2103, one appeal from a United States Court of Appeals dismissed for want of jurisdiction, and five appeals from a United States Court of Appeals for want of jurisdiction together with consideration of the papers under § 2103. Instances of clearly frivolous appeals such as these taint any statistical analysis of the appellate docket.

^{57/} For example, one appellant, proceeding in forma pauperis and pro se, had four appeals from United States District Courts dismissed for want of jurisdiction. We note parenthetically that the named appellees in these four cases were a United States District Judge, the Chairman of the Committee on the Judiciary of the United States House of Representatives, a former President of the United States and the Chief Justice of the United States. See, supra, note 56.

appeals dismissed for want of jurisdiction, four were filed under § 1253 from Three-Judge District Courts under now repealed §§ 2281 or 2282 (injunction against enforcement of unconstitutional state or federal statute, respectively), and one was filed in alternative pleading under § 314 of the Federal Election Campaign Act of 1971, *supra*, and § 1253. The two appeals which were dismissed for want of jurisdiction, where certiorari would lie in accord with § 2103 and was denied, were filed under § 1252.

Of cases disposed of summarily on the merits, the Court affirmed two appeals under Section 5 of the Voting Rights Act, *supra*, and two other appeals brought under § 1253. Both appeals resulting in summary vacation and reversal were brought under § 1252 from final judgments declaring an Act of Congress unconstitutional. By contrast, ten appeals brought under § 1252 or 1253, or the specific provisions of other statutes, were disposed of by the Court after full briefing and oral argument, on the merits.^{58/} Again, in a substantial number of dispositions of appeals from district courts (40.74%), in this instance where the Court does not have the benefit of intermediate appellate review, appellant appears to have misjudged the extent of the Court's jurisdiction.

58/ These include, for example, *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) (constitutionality of Railroad Retirement Act of 1974; § 1252); *United States v. Will*, 449 U.S. 200 (1980) (2 cases: constitutionality of pay provisions of appropriations act as applied to judges; § 1252); *Hodel v. Virginia Surface Mining and Reclamation Association*, --- U.S. ---, 49 U.S.L.W. 4654 (Nos. 79-1538 & 79-1596, June 15, 1981) (constitutionality of Surface Mining Control and Reclamation Act of 1977; § 1252); *Hodel v. Indiana*, --- U.S. ---, 49 U.S.L.W. 4667 (No. 80-231, June 15, 1981) (*id.*); *Rostker v. Goldberg*, --- U.S. ---, 49 U.S.L.W. 4798 (No. 80-251, June 25, 1981) (constitutionality of exclusion of women under Military Selective Service Act; §§ 1253, 2282).

The caseload of the Supreme Court and the manner in which the Court deals with the mandatory appellate docket indicate that the Court considers the questions of constitutionality of Acts of Congress and State statutes more seriously than other cases, once the determination has been made that jurisdiction exists to hear the appeal. Suits from the federal courts are more likely to receive plenary review than suits from State courts. The inherent nationwide effect of injunctions against enforcement of federal statutes, prevalent in federal court litigation, appears to receive the most serious consideration of all. In a number of instances, the plenary review of particular appeals is followed by the summary disposition of related or similar appeals from other courts.^{59/} At the other end of the spectrum, particular types of cases in which the appellant has misjudged the jurisdiction of the Court also abound.

^{59/} See, e.g., Hodel v. Virginia Surface Strip Mining and Reclamation Association, supra, at 4656 n. 16 (acknowledging three cases pending on appeal, judgments in all of which were later summarily affirmed or vacated and remanded).

5. Proposals for Change

Revision or abolition of the Supreme Court's mandatory appellate jurisdiction has been a subject for debate since the founding of the Republic. Indeed, the initial distinctions between appeals and writs of error posed substantial problems for lawyers before the bar of the court even then.^{60/} The provision for consideration of appeals improvidently taken as petitions for writs of certiorari, currently § 2103, was added to the Court's procedure in 1925.^{61/} Since that time the distinctions between appeals from State courts and inferior federal courts have slowly been eroded by Congress and the Court's Rules. For the present purposes, it is only necessary to review the proposals of the last few years.

During the 95th Congress, S. 3100 and H.R. 12979, were introduced to repeal various provisions authorizing appeals to the Supreme Court. Hearings were held on S. 3100, and the bill was amended and reported to the floor.^{62/} Neither the Senate or the House took any further actions on the measure.

During the 96th Congress, S. 450 and H.R. 2700 were introduced for the purpose of eliminating certain appeals. No further hearings were held on the

^{60/} See, Act of September 24, 1789, c. 20, 1 Stat. 73; Wiscart v. D'Auchy, 3 Dall. (3 U.S.) 321, 328 (1796).

^{61/} Judicial Code of 1911, § 227(c), as added, Act of February 13, 1925, c. 229, 43 Stat. 936, 937, 938.

^{62/} Hearings before the Senate Judiciary Committee Subcommittee on Judicial Machinery, Supreme Court Jurisdiction Act of 1978, 95th Cong., 2d Sess. June 20, 1978.

proposal and S. 450 was reported.^{63/} The bill was called up on April 9, 1979, and after an amendment to remove jurisdiction over cases involving prayer in public schools, the bill was passed.^{64/} The House Judiciary Committee took no action on the bill, as referred, and a petition to discharge the Committee from further consideration failed to call the matter to the floor.

In the 97th Congress, S. 1531 has been introduced "to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review" Section 1 of the bill would repeal § 1252, eliminating appeals to review final judgments of courts of the United States declaring an Act of Congress unconstitutional. If this provision became law, review of decisions by District Courts would revert to the general class of review by the Courts of Appeals under 28 U.S.C. § 1291 (1976).

Section 2 of the bill would amend § 1254 by deleting ¶ (2) and conforming the remainder of the section by renumbering and retitling. If this provision becomes law, review of decisions by the Courts of Appeals that a State statute is repugnant to the Constitution or preempted by federal law, at the instance of the party relying on that statute, would be available only by writ of certiorari or certification under current ¶¶ (1) and (3), respectively.

Section 3 of the bill would rewrite § 1257 to provide that a writ of certiorari will lie in all cases in which an appeal or writ of certiorari currently lies. The amendment would not alter any of the underlying jurisdictional definitions.

^{63/} S. Rept. 96-35, 96th Cong., 1st Sess. (March 14, 1979).

^{64/} 125 Cong. Rec. S4138 - S4165 (April 9, 1979, daily ed.).

Section 4 of the bill would amend § 1258 to allow a writ of certiorari to lie in any case in which certiorari would lie from a State court. The right to appeal from the Supreme Court of Puerto Rico be eliminated by the amendment and the amendment would continue the conformance in light of the amendments to § 1257.

Section 5 of the bill would conform the chapter heading for Chapter 81 of Title 28, United States Code, to conform with the amendments noted above.

Section 6 of the bill eliminates the right to appeal from judgments of the United States Courts of Appeal on the constitutionality of provisions Federal Election Campaign Act of 1971, supra, part 1, ¶ (c), by repealing § 310(b) of the Act. This subsection includes specific provisions for "bringing" the appeal process within 20 days; these requirements would also be eliminated and the provisions of § 2101(c) and the Rules of the Court would become effective over such cases.

Section 7 of the bill would eliminate the right to appeal certain California Indian lands claims, if any survive, discussed, supra, part 1, ¶ (e).

Section 8 of the bill would substitute a petition for a writ of certiorari for the right to appeal over questions challenging the constitutionality of the Trans-Alaska Pipeline Authorization Act, discussed, supra, part 1, ¶ (f). The provision for a writ of certiorari directed to the District Court, rather than the current, more complex, procedure of filing an appeal with the appropriate court of appeals and petitioning the Court for a writ of certiorari before judgment appears to be unique both in its procedure and its exclusivity. We should note, also, that the 60-day statute of limitations in the provision cuts off suits to test the constitutionality of the Act per se, contrasted with

challenges to the constitutionality of the Act as applied, and the elimination of that limitation may revive the possibility of commencement of litigation challenging the constitutionality of the Act per se.

Section 9 of the bill stipulates the effective date to follow the date of enactment by 90 days. Further the section provides that the provisions of the bill shall not effect any case pending before the Supreme Court.

The bill does not propose to eliminate all of the obligatory or mandatory appellate jurisdiction of the Court. The bill leaves intact provisions under the Presidential Campaign Fund Act, the Regional Rail Reorganization Act of 1973, the Federal Trade Commission Improvements Act of 1980, the Civil Rights Act of 1964 and the Voting Rights Act of 1965. This conclusion is further supported by the retention intact of 28 U.S.C. §§ 2101 - 2104, 2107 (1976), providing procedure and time limitations for the right to appeal generally. If the bill were intended to obliterate the right of appeal to the Supreme Court, and thereby relegate the process of review to certiorari and certification, and given the general caveat on completeness of cataloging all direct appeal provisions, it would be necessary to amend and repass the chapter with a traditional implicit repealer prefacing each section, or a specific statutory disclaimer of the right to appeal.

As has been noted in the particular setting of cases during the 1980 Term of Court, several appeals could have arisen under specific provisions left intact under the bill. From the review made of summary dispositions and judgments after full briefings and oral argument, however, only two appeals clearly

brought under the Voting Rights Act of 1965, and summarily affirmed, would have been properly appealable under the provisions of the bill.

The bill appears to consider the relative importance of the administration of certain Acts and the conclusiveness of the constitutionality of others while the general allowance of appeals in all situations in which the constitutionality of an Act of Congress or the constitutionality or preemption of a State statute are concerned has been rejected. It is clear that the bill will grant the Court greater leeway in determining its caseload, much as the review of the obligatory or mandatory appellate docket appears to receive more concerted attention by the Court than the discretionary docket.

No similar bill appears to have been introduced in the House thus far in the 97th Congress. Accordingly, S. 1531 is the only contemporary proposal to alter the obligatory jurisdiction of the Court. However, we would suggest that bills are likely to exist which include specific rights to appeal judgments of inferior federal courts to the Supreme Court.

Conclusions

This paper has reviewed the law and practice of the Supreme Court's mandatory appellate jurisdiction. There are in excess of a dozen provisions currently in force which require the Court to hear and determine particular cases brought by appeal. In addition to the general class of cases in which a State or federal statute is held to be unconstitutional by a federal court, or a State statute is upheld against a claim of unconstitutionality by a State court, there are particular provisions for injunctions against the enforceability of certain federal statutes, and other particular provisions for an appeal no matter what the determination of the lower court vis-a-vis the constitutionality of the statute. These special provisions include the Federal Election Campaign Act, the Presidential Campaign Fund Act, the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Regional Rail Reorganization Act and the Federal Trade Commission Improvements Act of 1980. In at least one instance, a broad range of cases may be brought by appeal to the Supreme Court on the interpretation of a statute alone.

In considering appeals, the Court must first determine the jurisdictional correctness of the filing. Where the filing of an appeal is improvident, the Court must determine whether certiorari would lie, and, if so, determine whether to grant certiorari. If certiorari would not lie, the Court will dismiss the appeal for want of jurisdiction.

If the Court has jurisdiction, a determination must be made on the extent of briefing and oral argument necessary to decide the issues. If oral argument

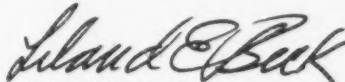
is deemed necessary, probable jurisdiction will be noted. If further briefing is deemed necessary to determine the Court's jurisdiction, the question of jurisdiction will be postponed until argument.

If the Court determines that no further briefing is necessary to determine the merits, an order will be entered either (i) affirming the judgment of an inferior federal court or dismissing the appeal for want of a substantial federal question where the judgment is from a State court, or (ii) vacating the judgment and remanding the case to the court below for further proceedings. These summary dispositions -- while on the merits -- have little precedential effect beyond the parties and the litigated issues between them. Only where a subsequent case is "four square" with the summary adjudication will the summary adjudication be of precedential value.

The Court's docket in recent years has reflected changes in the mandatory jurisdiction. A marked decline in the number of appeals is evident after repeal of the general provisions for seeking injunctive relief on the basis of unconstitutionality from Three-Judge District Courts. Cases from State courts predominate the mandatory docket, but there is a high rate of dismissal for want of jurisdiction, or meritorious dismissal for want of a substantial federal question. Appeals from the federal courts of appeal have correspondingly high rates of summary action. Appeals from district courts appear to have the greatest likelihood of receiving plenary review, in part due to the specific statutory authorizations and the Congressional determination of general importance, and despite the fact that trial records are often sparse. The "error" rates which may be generated from these three types of appeals are quite high, although skewed by inartful pleadings of several particularly contentious litigants.

In short, the mandatory jurisdiction is complex at best. The cases which are brought to the Court include the most significant issues of the day, such as Rostker v. Goldberg, the constitutionality of the all-male draft. However, the mandatory jurisdiction is also subject to abuse, as is perhaps best illustrated by the twelve appeals brought by two litigants, all of which were dismissed for want of jurisdiction, either outright or in tandem with certiorari denied. Finally, litigants do not appear to fully understand the complexity of the Court's appeals practice, best illustrated by the high rates of dismissal for non-meritorious reasons.

Contemporary proposals have not sought to completely obliterate the mandatory jurisdiction of the Court, but rather to redefine that jurisdiction in far more narrow circumstances, such as civil or political rights and specific instances where Congress feels an early disposition by a final arbiter is prudent, such as the legislative veto provisions of the Federal Trade Commission Improvements Act. As with previous adjustments to the Court's mandatory jurisdiction, this rebalancing is a continuing process.

A handwritten signature in cursive script, reading "Leland E. Beck".

Leland E. Beck
Legislative Attorney

Senator HEFLIN. Now we will proceed to another panel. The final legislation we consider today is Senate bill 1532, which would amend the Federal Rules of Civil and Criminal Procedure with respect to examination of prospective jurors.

Trial by jury is considered the bedrock of the American judicial system. The sixth and seventh amendments to the U.S. Constitution guarantee this fundamental procedure respectively in criminal prosecutions and in civil cases where the value in controversy exceeds \$20. Inherent in this constitutional mandate is the basic assumption that jurors will render their decisions impartially and without prejudice.

Today we will consider how this constitutional guarantee may be carried out most effectively. Presently rule 24(a) regarding civil suits and rule 47(a) regarding criminal cases of the Federal Rules of Procedure—of course, one being of the civil and the other criminal—provide Federal judges with discretion as to whether or not they will permit litigants to conduct oral examination of prospective jurors.

Senate bill 1532 would remove this matter from the discretion of the court and require that they permit the litigants through their counsel—or by the litigants if they do not have counsel—to directly participate in voir dire examination. This legislation affects the heart of the Federal trial procedure and has far-reaching effects on the practical aspects of jury trials.

We are fortunate to have several outstanding attorneys today to testify on this very important issue. Mr. Adrian Foley of Newark, N.J., who is the vice chairman of the litigation section of the American Bar Association, I believe you have a plane to catch at a certain time so we will allow you to go ahead, and we will call on the others thereafter.

STATEMENT OF ADRIAN FOLEY, VICE CHAIRMAN, LITIGATION SECTION, AMERICAN BAR ASSOCIATION, NEWARK, N.J.

Mr. FOLEY. Thank you, Mr. Chairman, and thank you also for the preliminary remarks you made. I should like also to have the record—and I am sure it does—include the introductory remarks made by you at the time that this bill was introduced. They fully state the objectives which we all seek, and in one sense I feel that it is superfluous to add any generalities.

I am privileged to appear before you on behalf of the American Bar Association in response to the gracious invitation of the chairman to our president, Mr. David Brink. John Cleary, who is the executive director of the Federal Public Defender Agency of San Diego, will also speak on behalf of the American Bar.

I have filed a report, and would ask that those remarks be incorporated in the record.

Senator HEFLIN. They will so be.

Mr. FOLEY. Thank you.

As the Senator has noted, we are here in the hope of changing a practice which has existed and under which we have operated for a great many years, and I might suggest operated not too well. Not too well for the reason that the Federal judiciary by and large, except in isolated instances, has not availed itself of the discretion-

ary power which it has to permit direct questioning of jurors by counsel. We would not require this bill had that discretion been exercised more liberally. Unfortunately, it has become the rule that direct examination is not permitted.

The American Bar has in the last 6 years turned its attention to this problem three different times. In my written report I refer to three specific actions of different bodies of the American Bar, culminating in a policy decision supporting this particular bill. I will not repeat the formal statements of those three actions. I think that they are most eloquently self-evident from the words found in the report.

Rather, in just a few brief moments I would like to address myself to the commonsense or practical reasons why this bill should be adopted. First of all, the trial attorney, the counsel for plaintiff or defendant, the prosecutor or defendant, at the outset of a trial surely knows the facts and legal issues of a case better than the judge. Hopefully at the end of the case this would not be so but surely at the time of the voir dire questioning, he alone can appreciate the nuances of answers even to general questions. He is in a much better position than the court to recognize some innate sense of predisposition on the part of an answerer and be prepared to follow up with further questions. Therefore, it strikes me that the very commonsense of the thing suggests that this is a proper bill.

Second, our system has some built-in conditions, shall we say, which negate the objectivity of answers in response to a judge. After all, to preserve the dignity of a court we put a judge on an elevated bench. He sits in different clothes, usually; he has a black robe. Of necessity, he is talking down to the layman when he asks him a question.

For example, he asks a juror a general question: Can you be fair? Well, looking up at this awesome figure—and many of our judges, it seems to me, or the ones that I practice before somehow or other always wind up with great physiques such as our good Senator Heflin here, which makes the problem even doubly acute—

Senator HEFLIN. We have arranged, however, that the level of the podium here is not much higher than the eye level of the witness.

Mr. FOLEY. That is true.

However, in the course of an examination by a judge, you can well imagine the layman looking up, feeling almost disloyal or somehow guilty to give a negative answer especially if the question is posed in such a way that suggests an answer. All too often the question is: You wouldn't be influenced, would you, by any newspaper, radio, or television accounts you might have heard of this case? Well, the average juror is not likely to say no to the judge.

However, a lawyer dressed in the same sort of clothes—hopefully—at the same level, speaking in a manner which does not instill fear, is more likely it seems to me to elicit a true and fair answer. There was an example just recently in the Washington Post here just a few weeks ago. Judge Ugast conducted a criminal trial, a murder trial, for more than a week. The jury retired. After the jury was out, on the second day they came in and were forced to advise the court that one of the jurors revealed only then that a

member of her family had been killed in much the same manner as the murder which was at issue.

The judge of course asked the defense counsel whether they would continue with a limited panel. They said no. The case was thrown out. All of that effort and cost went to nought.

In questioning the juror, the juror said she had forgotten the incident until that evening when she retired. Not to doubt her veracity, but I strongly suggest when the questioning of that juror was conducted entirely by the court, the memory might very well have been dimmed, dulled, or in some way frustrated by the fact that the judge alone conducted the voir dire.

I would earnestly recommend the support of this legislation. There are traditional arguments against the legislation. They will be more adequately addressed by Mr. Cleary, who speaks not only for the American Bar Association but other groups which he will identify.

Thank you ever so much.

Senator HEFLIN. Isn't Francis Hare, Jr., going to testify here? Come on up here. I want to save time here. Get up here in this panel, "Brother." [Laughter.]

Mr. FOLEY. Senator Heflin, before Mr. Cleary continues, would I be in any way in danger of contempt of this august body or any other if I should be forced to leave at some point to make the only plane I can get.

Senator HEFLIN. No, sir. You can do it. However, if you are going to leave let me ask you one or two questions. I heard a story fairly recently that I think gives a prelude.

Particularly in certain sections of the country—maybe not in New Jersey where you are from—the issue of alcohol, whiskey, drinking is a very serious issue in the minds of several people. There are issues today of abortion, other issues that we have that people have very strong feelings on. I am not critical.

This story was told to me. They said that there was a lady teaching Sunday school and she was speaking on the evils of "demon rum" and she was talking about the fact of how many homes it had broken up and everything about it. She made a statement, saying, "You will never get to heaven if you drink intoxicating beverages."

One fellow who thought he would have a little fun with her said, "Now, Sister Ledbetter, here it says in the Bible that Jesus turned water into wine." Her reply was, "Yes. I would have thought a lot more of him if he hadn't done it." [Laughter.]

Senator HEFLIN. Now I think the point that I raise by that story, and my experience of some 25 years as a trial lawyer—23 before, 1 year on the bench, and then 2 years after—for example, on the issue of whether somebody has been drinking who was involved in a motor vehicle accident, or whether someone has been drinking in some aspect that affected it, a judge asks the question, "Will the fact that it appears that the defendant or the plaintiff or whoever was involved in it was drinking at the time, will that influence you in your decision?" My observation has been over the years that if it is asked by the judge, that the answer always comes back—or else they do not want to answer it—saying, in effect, no. Depending on the way the judge asks, if he says, "Raise your hand if you think

that," or "Rise up," there are those that will not take that affirmative step.

Now involved in this, by asking two or three questions even of the panel as a whole or of the individual, you can soon tell by body language whether there is a prejudice in that regard. Of course, we have to balance the time frame between the way some people spend days and days examining juries, and how it can be operated. However, from my experience certainly it is almost impossible for a lawyer to spot body language, demeanor, unless he participates in the voir dire examination.

Now we have a long body of law that says if a judge tries a case without a jury, and in effect an appellate court does not overturn his findings of fact except in the rare case of extreme abuse of discretion, based on the concept that he observed the witness testify, he observed the demeanor, he had an opportunity to tell whether a witness was telling the truth or not. Carrying that comparison down to the participation by counsel in whether or not a witness has prejudice or not has always impressed me as being something that is most important for a counsel to try to tell.

There is now the issue of race, and the judge who says, "Because the defendant is black, can you give him a fair trial?" On the other hand, is it "Because the defendant is white, can you give him a fair trial?" All of these matters are involved, in which I am sure that there are differences of opinion among jurors as to various individuals and various other issues. We are getting more and more into intensified issues in this country, because of special attention being given to them, than we were before.

I would like to hear your comments before you leave, largely from the viewpoint of a State like New Jersey, as to certain areas that you foresee that present real problems under the present method used by Federal judges in qualifying juries, going through the voir dire, as to certain prejudices that are present which we have to admit are true and do exist among people.

Everybody has prejudice one way or another. I do not think that you can find anybody that does not have some sort. Maybe we control them. I try to avoid any prejudice myself and that sort of thing but I do prefer brunettes over blondes because I married a brunette. I mean, that is not a prejudice but it is a factor that gets involved where you are trying to seek the truth and to have 12 impartial jurors, or as close to being impartial as you possibly can.

If you would, since you have to leave, I would like you to comment on inherent prejudices, the dangers that exist under the present system.

Mr. FOLEY. Thank you, Senator. I appreciate it. I have to sound one cautionary note because in my experience of trying cases for some 33 years, while that has been primarily in the great State of New Jersey I am influenced in a lot of my philosophy by my heritage, and I was born in the great State of North Dakota. Therefore, I have a bit of a country background and know a little bit more about those prejudices, perhaps.

I suggest you rightly perceive that only the intervention, the intercession of counsel in the interrogation of witnesses can reveal the sort of things which are not revealed except with probing questions.

New Jersey is a State which is a microcosm of the United States. We have rural areas, we have farm areas, we have shore areas, we have heavily industrialized areas; we have vigorous competition for employment, especially in our populous counties. We are the most populous State in the country. Only a person who is cognizant of this agitation created by limiting the available jobs can possibly interpret the answers of jurors so as to bring out a fair jury.

One other thing: Not only do I endorse the thought that this is best obtained and only obtained through the counsel's interrogation but even in the preemptory challenge—primarily we are concerned with the challenge for cause but in the preemptory challenge—I think we have all had the experience of interrogating a witness and realizing pretty soon—either that or watching another lawyer interrogate a witness—and finding out that the body chemistry of the juror and the interrogating lawyer do not mix.

Now this might not be anyone's fault but some people just do not like the cut of a person's jib, and his client should not be made to suffer for that reason. This will never be apparent if the interrogation is conducted entirely by the court, and can only be developed by the personal rapport or lack of rapport established in the interrogation. I think that is what was the request that you made.

Senator HEFLIN. Well, are there particular matters in New Jersey that creep up that you have to be warned against? For example—I do not want to take up all this time—in certain sections there are religions that firmly believe in certain Biblical instructions, "Judge not that you be not judged," and other Biblical statements to the effect that on a jury there have been instances in which they felt that Biblical admonitions kept them from making decisions after they were on a jury.

I do not know whether you have run into any of this experience. This does not happen frequently. It is a rare situation but there have been instances in which I have known that it existed. Are there any particular things about New Jersey and the North that you would like to point out?

Mr. FOLEY. Actually because we are, as I suggest, a microcosm, it is not that we have particular problems. I think we have them all.

Senator HEFLIN. In other words, you say you have everything. All right, sir. Fine.

Who did you wish to have testify next? Mr. Cleary? Go ahead.

STATEMENT OF JOHN CLEARY, EXECUTIVE DIRECTOR, FEDERAL PUBLIC DEFENDER OFFICE, SAN DIEGO, CALIF.

Mr. CLEARY. Thank you very much, Senator Heflin. It is an honor to be here. I would take the opportunity to thank the committee for entertaining this legislation.

I am appearing here on behalf of the American Bar Association, representing specifically the criminal justice section. I am also here as a spokesperson for the National Association of Criminal Defense Lawyers. I apologize. I had submitted a statement on behalf; it had been mailed but it is not yet received. I would hope that that will be incorporated.

Senator HEFLIN. It will be.

Mr. CLEARY. Further, I am authorized to indicate to the Senator that the National Legal Aid and Defender Association has adopted the position of the National Association of Criminal Defense Lawyers. In behalf of our statement, we have contained the ABA resolution with specific word changes.

My practice is solely Federal. I have been 10 years a Federal defender in the Southern District of California. I practice only in the Federal court.

This legislation transcends the Federal judiciary because, as the chairman knows, the States have tended to copy, emulate the Federal system, especially in this area of totally excluding lawyers from the voir dire process.

I would like to point out a survey that was made in 1977. Under the existing rules they portend to give counsel the discretion to participate in voir dire. In the year ending June 30, 1980, in the total Federal system there were 3,418 criminal jury trials. There are 516 Federal judges authorized, although there are some vacancies. Senior judges serve and are not charged to that number. It averages out 15 jury trials per judge, 7 for which are criminal.

We hear many times what the Senator alluded to, protracted, extensive, didactic, complex, almost harrassment of prospective jurors. I can tell you that in the Federal court, when it comes to jury selection, it is called "supermarket justice" because we cut down the time to a fine line. Ninety-two percent of the jury voir dire, on the survey conducted of judges by judges, indicated that it was less than 2 hours. Sixty-five percent was 1 hour or less. The average was a total of 50 minutes to explore and probe for a basis as to either a challenge for cause or a preemptory challenge. Those judges that permitted voir dire by counsel number less than 25 percent, so we now have on record 75 percent of the Federal judiciary excluding counsel from any type of direct voir dire.

A comparison between judge-conducted voir dire and attorney plus judge-conducted voir dire was averaged out. The difference was 1 minute: 50 minutes by the judge alone, 51 minutes to add in counsel. In fact, the survey indicated that when the judges conducted it exclusively by themselves it was 73 minutes, and if counsel conducted it by themselves, 43 minutes. Therefore, if anything, the contrary was true. Now again it is in the atmosphere of the Federal courts which desire expeditious handling of these matters but sometimes expedition can outdo fairness.

In the ABA proposal this legislation, 1532, uses the word "shall" instead of "may" and modifies some of the other language. The ABA position presented and adopted by the house of delegates in February of 1981, having been evaluated by those representing all aspects of the system, including the judiciary, came forward with what I call a compromise plan. The critical one was voir dire by counsel and the term used is "directly question" the participants. I will touch upon that later in light of the California experience we had in the State courts.

Second, it should be individual and panel because if you permitted voir dire, couldn't the judge just say, "OK, ask the whole venire; we have 30 people here under our system," because in the Federal system we use the struck jury. You bring in 30: 10 preemp-

tories for defense; 6 for prosecution. Just go around. Make your shot at the whole group but no individual questioning.

Last but not least—and this was a very delicate thing—the matter has to be quantified because if you can say voir dire when 75 percent of the judges have said no voir dire, couldn't they satisfy the rule by saying, "Ask the name of the first witness, counsel." You ask the name of the first witness; you have been permitted voir dire. You did not specify. Therefore, the suggestion by the American Bar Association was that there be at least 30 minutes, and that probably is the most pivotal aspect of the ABA proposal which we hope would be included or adopted in your legislation.

Also touched upon were open-ended questions; a voir dire list, which I think would expedite the voir dire, if counsel 24 hours in advance knew who the jurors were and sometimes even had a little questionnaire available. Under the Supreme Court case law test you are entitled to that type of information. There is also the fact that certain elements about the jurors' background should be explored and an orientation given by the judge.

In California we had a statute that said, "Counsel shall have the right of examination," and a State judge in Los Angeles decided to follow the Federal example and say, "No voir dire by counsel." However, the attorney said, "The statute says 'shall.'" The judge said, "Yes, you can submit me written questions."

He took that up to the California Supreme Court, *People v. Crow*, and the judge was right. He did get the examination; it was not direct. The California legislature was somewhat shocked by that decision and in 1974 corrected it and said, "Counsel will directly and personally examine. . . ." Therefore, literally, our legislature, when faced with the Federal voir dire of total exclusion, reacted very quickly to give that right back in State courts.

The problem in this area is that the Federal judiciary should be a leader, not an anachronistic millstone, for the advancement of justice. When lawyers who practice regularly in State courts go into the Federal court, some of them are traumatized by the experience of having no voir dire where they had it in their State courts. I think that we should put Federal courts at least on a par with most modern State jurisdictions.

The last thing that you touched upon in the issues was race. There was an issue before the Supreme Court of the United States earlier this year dealing with a Mexican defendant charged with alien smuggling. A request had been made by counsel to conduct voir dire: denied. Counsel had a written question concerning racial prejudice: "Is there any racial prejudice against this defendant?" The judge denied that. Total voir dire conducted by the judge alone: less than 10 minutes. The Supreme Court of the United States affirmed that decision on the grounds that what is given for voir dire is left within the unfettered discretion of the trial judge.

There is another aspect here that is important, and that is jurists. This group goes into the qualifications of Federal judges. The Senate of the United States must confirm every Federal judge nominated and appointed by the President of the United States. Jurors are judges of the facts. When they see this quick, truncated, almost automatic inquiry conducted, it tells them that their role is very little, that they are really unimportant. Jurors, to have some

sense of it, should be able to get direct contact from those who might have the most knowledge about the case, the attorneys trying it.

This bill proposes that either side have not less than 30 minutes. There are some among my fellows and colleagues who are concerned that 30 minutes is not really enough but in the 75 percent of the cases where no voir dire is given at all, we feel that that will give at least a minimum protection and preserve another aspect of the Constitution which is that the defense attorney, as an advocate giving effective assistance of counsel, is entitled to a sixth amendment protection.

Senator HEFLIN. All right.

Next, Mr. John Arness with the American College of Trial Lawyers, Washington, D.C.

**STATEMENT OF JOHN P. ARNESS, ATTORNEY, AMERICAN
COLLEGE OF TRIAL LAWYERS, WASHINGTON, D.C.**

Mr. ARNESS. Thank you, Mr. Chairman.

I am a partner in the law firm of Hogan & Hartson, Washington, D.C. I am past president of the Bar Association of the District of Columbia and have some 30 years' experience as a trial lawyer.

I appear this morning in my capacity as chairman of the Committee on Federal Rules of the American College of Trial Lawyers. That college has a direct and immediate concern with trial procedures, both in the Federal and the State courts, and fully supports the legislation contemplated by S. 1532.

That bill, of course, has an extremely narrow focus but it is very, very important in the overall system of justice which we have in the United States. I note that the chairman has already pointed out in his introductory remarks, that ours is a very important system and a very unique system in terms of the systems available in other countries throughout the world. The citizens of the United States do cherish both the extent and the quality of justice that is theirs to partake of.

We feel that to deny participation by counsel in the process of voir dire examination is in effect to deny effective examination of prospective jurors. I do not intend to embellish upon that because both of the speakers who have preceded me this morning have done a fine job of pointing out why that is so, but if there is to be any sensible and just determination by juries under our system of justice, there has to be a careful selection of those jurors so as to eliminate the bias and prejudice that can otherwise thwart the entire objective of their deliberations.

The opponents of voir dire examination have consistently raised the argument that it is time-consuming, burdensome, and oppressive. That is really not a material factor, as has been pointed out by the statistics Mr. Cleary has given in his oral presentation. Time need not be a burdensome factor if the rules under which voir dire examination is conducted by counsel are carefully conceived and controlled.

There are some systems under which the examination of jurors is unduly protracted, and goes on and on. That need not be the case, and when it does happen it is the fault either of the presiding

judge for not exercising discretion in controlling the examination, or of the rules under which the examination is conducted.

However, Mr. Chairman, that is a problem for another day. If methods are cumbersome and should be reformed, then that can be taken up in another forum. This bill addresses the fact of whether there should be counsel participation and there is no question, we feel, but that without counsel participation the examination cannot be effective.

I believe that that is startling when it is pointed out that 75 percent of the Federal judges do not permit counsel to be personally involved in the jury selection process. I think more startling—

Senator HEFLIN. How was that determined? Seventy-five percent do not allow it at all?

Mr. CLEARY. That is correct.

Mr. ARNESS. That is correct, Your Honor.

Senator HEFLIN. Was that a study made by—

Mr. CLEARY. The study was made by the Federal Judicial Center, and the study was the result of a survey of Federal judges.

Mr. ARNESS. My point is, Mr. Chairman, that more startling than that is the tendency and the ever-increasing propensity on the part of Federal trial judges to exclude counsel participation. This mechanism, under which Federal judges seem to think that they can control the situation better and save time by taking voir dire entirely upon themselves and limiting counsel's participation to the rule of submitting written questions in advance is becoming more and more the rule. Therefore, we believe that Senate bill 1532 will provide a very necessary reform in order to continue to maintain the quality of justice under the Federal jury system.

Thank you.

Senator HEFLIN. Thank you, sir.

We are privileged to have Mr. Francis H. Hare, Jr., of Birmingham, a fellow of the International Academy of Trial Lawyers, to be with us. He is a famous trial lawyer in the South and in the Nation, having attained great fame in his discovery of certain cases dealing with automobile design. I could go on into other cases including a case in which he participated with me, pertaining to a cotton truck on a very narrow bridge that crossed the Tennessee River. Therefore, I happen to know Mr. Hare quite well and we are privileged to have such an outstanding trial lawyer to appear before us.

STATEMENT OF FRANCIS H. HARE, JR., ATTORNEY, AMERICAN TRIAL LAWYERS ASSOCIATION, BIRMINGHAM, ALA.

Mr. HARE. Thank you, Your Honor, Mr. Chairman, for that generous if not borderline—my soul may be in jeopardy for your generous comments.

My observation is going to be more personal than statistical and I am going to try to summarize one or two of my personal observations without repeating the I think unanswerable points made by the three gentlemen who preceded me and who, I candidly admit, expressed it much more articulately than I could have.

I want to first make the observation that everybody knows that the trial of a lawsuit—civil or criminal but I am going to be focus-

ing on civil—is an intensely personal event. A lot of the folks that I see, in the literature that was provided me, that write about this do so on the basis of studies and statistics, and I suspect have never tried a lawsuit.

People that think that the resolution of disputed issues is a cold and dispassionate process have never tried a lawsuit. It is an intensely emotional and personal event in which there is an intense emotional interreaction between the jurors and the parties and their counsel and the issues. The whole purpose of a voir dire is to identify the potential reaction of the prospective jurors to those issues before the trial begins.

Now in my statement is an event that occurred some 10 years ago. Our firm hired a psychologist, one of the leading psychologists in Alabama, and we gave him a lot of literature and he went out and did a lot of studies about group decisionmaking dynamics to tell us what caused jurors to get to certain results.

After about 6 months of studies and the big bill we paid him for this very important study, he came into a firm meeting and said he was ready. We said, "All right, now, tell us what influences jurors to reach a certain result." He said, "Well, I don't know." Six months and \$5,000 later we came up with a blank.

He said, "No, but I can tell you two things that are almost irrelevant." We said, "Well, like Edison said, you now know 100 things that do not work. That is helpful. What are the two things that are irrelevant?" He said, "Well, one is the law and the second is the evidence." [Laughter.]

Almost every trial lawyer would, if it was phrased a little differently, tell you the same thing. We said, "Well, what are you really saying?" He said, "Jurors do in their verdict what they think is right, and what they think is right stems a great deal from their cultural or emotional identification with the issues that are involved, and the issues that are involved are sometimes quite different from what the Federal judge would perceive as being the legal issues just by reading the pleadings."

It stems in part from their emotional identification with the parties. He said that was the second aspect of the trial of the lawsuit, and third, the lawyers.

What I am saying is that all of that involves personal information that simply cannot be acquired by a voir dire examination conducted exclusively by the Federal judge. I am not going to belabor the comment about the Federal judge sitting in the black robes asking very authoritative questions; you are just not going to get the same psychological dynamic when the judge asks the question as when the lawyers do.

My point is that there is certain essential information that is going to pivotally affect the outcome of that lawsuit that just cannot be acquired other than by the attorneys' oral participation and personal participation in the voir dire.

Your Honor, Mr. Chairman made the comment that everybody has a prejudice, and the whole purpose of voir dire is to identify that. I made a list, and I called lawyers all around the country. It is true that virtually every case involves some special emotional issue or some critical soft spot that could evoke a personal bias on the part of a particular juror.

I am just going to quickly read into the record some of the issues that are involved in literally every lawsuit: drinking by the plaintiff or the defendant; the plaintiff or the defendant a member of a minority race, or a member of a minority religion, or from a different part of the country.

I am talking about plaintiff or defendant, and it may help you or it may hurt you, but I am talking about things that are personal, that are going to or are likely to influence the outcome of the lawsuit: whether the plaintiff or the defendant is wealthy or poor; whether the plaintiff or the defendant is a member of labor or management—there are some parts of the country where the labor/management dichotomy is a right touchy issue; whether the plaintiff or the defendant is on a motorcycle; whether the plaintiff or the defendant had been convicted of a crime; the very reaction that some people have to a damage suit, negative or positive; when you have a suit against the city and you are trying a case before the jury, and they are all residents and taxpayers of that city and may have to pay the judgment.

Your Honor mentioned one that I want to give a poignant example about folks having a view that comes from the Bible. Nobody in the world is more sensitive to that than I am, but I tried a case one time in Federal court. In Alabama we get punitive damages only in a death case but punitive damages are frequently issues in lots of different personal injury lawsuits.

This was particularly poignant because it was under the Alabama wrongful death statute, and I asked the judge if he would ask a question of the jury about their reaction to the Alabama death statute, it being true that punitive damages only were provided. He would not ask it because he said it is going to be assumed that they are going to follow the law, and that they are not going to be possessed of any emotional or personal reaction to the law itself.

We tried the case, a very good case, and we lost it. He did permit us to talk to the jurors afterward. We had a six-person jury and the foreman of the jury was a lady. All during the time when we were talking about punitive damages, even though she had been very favorable in her responses during the trial to the issue of liability, as soon as she realized that that verdict she was giving was punitive damages it just looked like somebody had stuck her with a hatpin.

She had a view, based on the scripture, that "Vengeance is mine, sayeth the Lord," and there wasn't anything in the world, no amount of law and no amount of evidence that was going to get her to change her mind. She thought that she really would put her soul in jeopardy if she took vengeance upon herself. Well, that would have been revealed if the judge had permitted the lawyers to have some sort of personal interaction in the voir dire.

I want to close by talking about some of the objections. I am not going to talk about the time because I honestly just do not believe the studies that say that it would take 5 minutes more or 12 minutes more—I think the highest was 12 minutes more—to conduct voir dire. My experience has been that in the Federal court it really takes longer because, by the time you finish writing out the questions and going through the stilted process of submitting those questions and taking exceptions and arguing why you should do them and offering new written questions, inevitably something is

going to come out, even when the judge does that stereotyped sort of thing, that you are going to want to ask. By the time you go through that, my experience has been that it is a lot shorter if you let the lawyers have a brief time to do it very informally amongst themselves.

I want to talk about the abuse aspect of it. I believe that is mostly only a theoretical problem. For instance, one of my good friends in New York—I called him before I came up here to testify—in New York the judge is not even present when they do the *voir dire*, in New York City. I said, "My goodness, doesn't one side or the other generally take advantage of one or the other by that process?"

He said, "Heavens, no." If a lawyer does something to abuse the purposes of *voir dire*, he is going to get himself chewed out in front of the jury at the most critical stage he could possibly make a mistake. He is going to have his credibility impaired even before the trial starts. In fact, we go backwards. If you do something wrong, if the defense lawyer does something wrong, the plaintiff's lawyer has to call the judge back in. If he has called him in for a real reason, he is going to impair himself and hurt his client and his case before the trial even starts.

Therefore, I just want to conclude by saying that I strongly urge favorable action on Senate bill 1532. A fellow somehow or other heard I was going to testify, the president of the trial lawyers in Arkansas, and wrote me a letter that is an eloquent summary of everything that I have said, and I would like to amend my statement by introducing that if I could.

Senator HEFLIN. Yes. That will be made a part of the record.

Of course, I think anyone who has had experience with trying lawsuits realizes that people do have prejudices. There is a need—at least it is my observation, I believe, and that of 99 percent of those that have engaged in the trial practice—that there be participation by counsel. On the other hand, you have these situations where they have dragged out for 2 or 3 weeks, the rare case. Publicity has been given to it.

There are recommendations pertaining to time limitations. Again, an individual case may depend upon that. There have been expressions of time limitations here. Do any of you care to comment further on any time limitations that might be—

Mr. CLEARY. Senator, I was just hoping because it is 75 percent—and that number is growing, as Mr. Arnass pointed out—where you get no *voir dire* at all, I think the statement of the minimum should be there. Even with 30 prospective jurors, that is 1 minute per, which of course you might think ridiculous but since we get nothing now, the quantifying of a minimum would be helpful.

Further, if the Senator would permit, I would mention that the reference I made to the California experience is documented by President Dennis Roberts of the California Attorneys for Criminal Justice. I know he sent a letter to the Senator and I would ask that that be admitted as a part of the record.

Senator HEFLIN. It will so be.

[Letter of Mr. Roberts follows:]

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
Los Angeles, Calif., November 11, 1981.

Re: Attorney Voir Dire in Federal Court, S. 1532.

Hon. HOWELL HEFLIN,
U.S. Senator,
Committee on the Judiciary, Washington, D.C.

DEAR SENATOR HEFLIN: Next Monday the Senate Committee on the Judiciary Subcommittee on courts will consider S. 1532 which proposes to authorize participation of attorneys in voir dire in federal civil and criminal cases. The California Attorneys for Criminal Justice, with approximately 2,000 members, and in California actively representing the concerns of defense counsel in criminal cases, urges that the Senate quickly pass this needed legislation.

The untoward experience in California with the federal method of voir dire, total abrogation of questioning by counsel, may be of some benefit to your legislative body in evaluating the importance of this bill as effecting state as well as federal practice. In the early 1970's in a Los Angeles criminal case the trial judge adopted the federal voir dire system which provided that the court would exclusively conduct the examination with the right of the attorneys to assist by submitting written questions for the prospective venire. California Penal Code § 1078 at that time expressly provided:

"He (the judge) shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant." (Emphasis added.)

Although the California statute unequivocally conferred the right of counsel to conduct a reasonable examination, the court emulating the Federal system approved the exclusion of counsel because counsel had the opportunity to submit written questions, the equivalent of examination. *People v. Crowe*, 8 Cal. 3d 815; 506 P. 2d 193 (1973).

Because of the complete removal of counsel from the voir dire process by precluding them from presenting questions orally to the prospective jurors, the California Legislature reacted swiftly. Section 1078 was modified to add to the above quoted sentence: "such examination to be conducted orally and directly by counsel." Cal. stats. 1974, c. 960 p. 2000 sec. 1.

California this year came full circle in *People v. Williams*, 29 Cal. 3d 392; — P. 2d — (1981), in which Justice Mosk, the former Attorney General and dissenter in the *Crowe* case, reversed a criminal conviction for involuntary manslaughter because defense counsel was not given an adequate opportunity to probe prospective jurors for the exercise of preemptory challenges. In a comprehensive opinion he pointed out the obvious reluctance of jurors to express bias in front of their fellows. An unduly truncated voir dire would telegraph to the jurors the expected preordained response that they could serve fairly. He stated:

"Moreover, little psychological insight is needed to realize that the setting in which voir dire is conducted creates additional pressures for the venireman to answer questions as he believes the judge would have him answer, or in conformity with the answers of the processing panelists." 29 Cal. 3d 392, 403.

California criminal jury caseload dwarfs the federal system. For the year ending 30 June 1980 there were 5,075 criminal jury trials in Superior Court (1981 Annual Report of the Administrative Office, 103, Table XX-A) and 4,945 non-traffic criminal jury trials in the Municipal Court (*Ibid.*, 247, Table 34), a state total of over 10,000. For the year ending 30 June 1981 in the 94 federal district courts covering 50 states and the territories there were a total of 3,418 criminal jury trials (over 10% were only one-day jury trials). 1980 Annual Report of the Director of the Administrative Office of the U.S. Courts, A-41. Although there may be abuses of voir dire which would justify the review and limitation of voir dire by counsel in some cases, the complete removal of counsel from this important process to determine an impartial jury seems an example of overkill.

The federal experience in California varies, and there are a few federal judges who permit counsel to participate or supplement the voir dire. The majority exclude counsel from the process, even though the original rule adopted in 1946 recognized a discretion to be exercised on a case-by-case basis rather than ratifying a policy of exclusion of counsel. S. 1532 would rectify a serious situation and bring the federal court more in tune with the modern and contemporary practice found in state courts.

The federal courts are becoming rarefied enclaves where many counsel fear to practice because of the almost unfettered and unlimited discretion given to federal trial judges in the conduct of criminal cases. Ours is a rule of law not of men, even judges. Discretion is necessary but is not a shield for abuse because of inability to

obtain review. Our state courts have clearer guidelines, and the federal system should announce a "bright line" standard for federal courts. Congress should bring the federal courts up to par with our state courts.

Our organization wholeheartedly recommends the technically proficient and balanced approach of the American Bar Association and would encourage the adoption of the specific language for amending Rule 24(a). (A copy of the ABA resolution is attached.) Furnishing the list of jurors one day in advance expedites the voir dire process, for it would remove this area of inquiry from the voir dire. In some jurisdictions there have been experiments of submitting questionnaires to the juror in advance so that the proceeding can be expedited in open court. To avoid unfair harassment of the jurors by counsel the proposed amendment would preserve the judicial control over voir dire and also emphasizes the need of the judge to instruct the jurors on the principles, purposes, and the particular procedure to be used by the judge in juror selection. This process varies, and it is important that the judge announce at the outset that jurors are an important part of the judicial process. Too often perfunctory questions and an unduly expeditious inquiry by the court telegraphs to the jury their limited and almost inconsequential role. In a criminal case the juror's attitude towards law enforcement as well as prior contact with the defense or prosecution should be disclosed. This information could be furnished with the list of jurors furnished 24 hours before the voir dire.

The judge should orient the jury and conduct the initial voir dire. Counsel would supplement this questioning with the time granted by the court. To avoid limiting counsel to ten-minute voir dire (the total voir dire in *Rosales-Lopez v. United States*, — U.S. — (1981) conducted by the judge alone was less than ten minutes), S. 1532 should incorporate the ABA proposal of at least 30 minutes by counsel for each side. Many of us feel that 30 minutes would be grossly inadequate in many cases, but in federal court where there is now no voir dire at least this would guarantee a minimum plateau. Judges certainly would have the discretion to grant more and are authorized to adopt guidelines to prevent improper questioning by counsel.

Our organization stands ready to provide any technical or other assistance you might need in seeking the prompt adoption of an amendment to Rule 24(a) that will bring it into conformity with its original purpose. Please include our statement in the record in support of this proposal.

Respectfully submitted,

DENNIS R. ROBERTS, *President*.

Mr. ARNESS. Mr. Chairman, there will be those who will be opposed to the concept of S. 1532, and they will insist upon time limits. I think that the response to that should be a minimum of 30 minutes and a maximum of 1 hour per party, to be enlarged in a given case upon good cause shown. I think that would satisfy all legitimate objections and prevent the type of runaway examination that on occasion apparently does occur.

Senator HEFLIN. Brother, do you have any thoughts?

Mr. HARE. I have no official observations. I would not put it in the legislation; I would put it maybe in committee comments because there are some cases where in the average case the lawyer is going to finish his voir dire—like the man says—in about a half an hour. A half an hour to an hour is the longest we see typically, but there are going to be some complex cases.

We had one last week where seven people on the jury were knowledgeable about the particular issue involved. This was a mining disaster case, and seven people on the venire knew something about mining and about elevators. That took 2 or 3 hours. It just always bothers me, the "bed of Procrustes" approach to arbitrary, fixed time bothers me. I would handle it in committee comments with recommendations rather than building it in any sort of inflexible way.

Mr. CLEARY. Senator, if I could just briefly, I think that is correct because there are some cases that even take days. We had a case involving a serious bombing of a labor union that took several

days. Pretrial publicity requires in camera voir dire, and so there are many cases that do not fall within the normal limit. However, the thought was that in the run-of-the-mill cases that we had to provide some minimum protection. That is why if there was a floor of 30 minutes in the statute or the rule, and then the commentary would explain that the existing system shows about 2 hours and that would be the expectation, it would be helpful.

Senator HEFLIN. There have been some judges who, in allowing counsel to participate, would not allow counsel to address an individual juror. They would allow them to address the entire venire. I remember mostly in the State court practice in Alabama some 20 years ago that that was the procedure. The State judges would not allow you to ask individual questions to individual jurors except on rare occasion.

I remember hearing a speech by Ed Rude, who was then the president of the American Trial Lawyers Association, an association of trial lawyers, in which he was highly critical of that and indicated that he felt that even sometimes jurors would not tell the whole, complete truth but by their body language and other things would indicate differently.

Again, it is hard to place limitations, but should this language include the right to examine individual jurors, and if so, should there be a limitation or do you have any suggestions relative to this?

Mr. CLEARY. On the proposal of the American Bar Association they specifically dealt with that concern because it is a very valid one. The problem is that the American Bar Association position balances the good faith of the judge. We think the judge should have discretion. However, in the legislation it said "individually or as a panel." The term "individual" is what the chairman mentioned and other counsel here have mentioned, that the feelings of the individual are what you have to probe, not "Can you be fair to a group?" and they collectively say yes.

The ABA language was "individually or as a group" but that that opportunity would be there. If the court would set strict time limitations, then it would have to be the judgment call of the attorney as to how to work it out within that time frame. I think the court could satisfy most of its concerns by saying in a case, "There is a limit of an hour for voir dire; go to it," and allow individual voir dire.

Mr. HARE. I am 100 percent for what he said.

Mr. ARNESS. Yes, I think that when you ask questions to the array assembled, once in a while you will get an individual response. If you are not able to follow up that response with questions to a particular juror, it is ineffective.

Mr. CLEARY. I can also say sometimes experience has been if you hit one juror with a question, a good question, the other ones pop up with the answer. Part of it is the nonauthoritative lawyer; they do not mind talking back to a lawyer, but they certainly do not like talking back to a judge.

Mr. HARE. A big part of voir dire is picking the fellow that you think will give an individual response, and then as soon as you do that you will see a half dozen hands go up where the people then feel the liberty of going ahead and speaking up individually.

Senator HEFLIN. Well, it has been a very helpful hearing, and I appreciate your testimony.

There will be other matters entered into the record from other organizations. It is my understanding Senator Kennedy would like to be entered as a cosponsor of this.

Do we have the American Bar Association's recommended bill? Is it available, and can it be made a part of the record?

Mr. CLEARY. Yes. It is part of our statement, as well as the report.

Mr. ARNESS. Mr. Chairman, I submitted written remarks on behalf of the American College Trial Lawyers last Friday. May they be made a part of the record as well?

Senator HEFLIN. Yes.

Mr. ARNESS. Thank you.

Senator HEFLIN. We would be delighted to have that.

[The prepared statements and other submissions of Messrs. Foley, Cleary, Arness, and Hare follow:]

STATEMENT OF
ADRIAN M. FOLEY, JR., AND JOHN J. CLEARY
on behalf of the
AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

My name is Adrian M. Foley, Jr.. I am an attorney actively engaged in trial practice in Newark, New Jersey, and a former member of the Board of Governors of the American Bar Association. Presently I serve as the Vice-Chairman of its Litigation Section. With me is Mr. John J. Cleary, Executive Director of the Federal Public Defender Office in San Diego, California, and an experienced trial attorney. David R. Brink, President of the Association, has designated us to appear before you today to present testimony on behalf of the Association on S.1532, legislation to afford parties and their counsel the right to conduct the voir dire examination of prospective jurors in Federal criminal and civil cases.

Currently, Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure govern the voir dire examination of prospective jurors. Both rules authorize the judge to conduct the voir dire examination and vest him with discretion as to whether counsel will be permitted to question prospective jurors. In practice, few Federal judges permit counsel the opportunity to question prospective jurors directly.

The American Bar Association believes this opportunity to question prospective jurors in both criminal and civil cases is fundamental to the jury system. In the last six years, the Association has adopted resolutions on three separate occasions to articulate its concern about jury selection in the Federal courts. In 1975, the ABA House of Delegates adopted a resolution sponsored by the Special Committee on Federal Practice and Procedure that expressed ABA support for "...the concept of voir dire by counsel as a matter of right in federal civil and criminal cases." In 1976, the House of Delegates approved a resolution sponsored by the Litigation Section that recommended Rule 47(a) of the Federal Rules of Civil Procedure be amended to require that counsel be permitted "to conduct an oral examination of prospective jurors." Finally, in 1981 the Criminal Justice Section recommended that Rule 24(a) of the Federal Rules of Criminal Procedure be amended to provide, among other things, that counsel "...be given a reasonable and adequate opportunity to directly question the prospective jurors, individually, and as a panel..." This recommendation was approved by the House of Delegates, amended to be applicable also to Rule 47(a) of the Federal Rules of Civil Procedure.

Further, the ABA Standards for Criminal Justice (Second Edition) also endorse the notion that counsel should have the opportunity to conduct a voir dire examination of prospective jurors. Standard 15-2.4 reads as follows:

"Voir dire examination should disclose grounds for challenge for cause and facilitate intelligent exercise of peremptory challenges. Interrogation of jurors should be conducted initially and primarily by the judge, but counsel for each side should have the opportunity, subject to reasonable time limits, to question jurors directly, both individually, and as a panel. Where there is reason to believe the prospective jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, counsel should be given liberal opportunity to question jurors individually, about the existence and extent of their preconceptions. It is the responsibility of the judge to prevent abuse of voir dire examination."

This identical language is also found in Standards Relating to Trial Courts (Standard 2.12) developed by the American Bar Association Commission on Standards of Judicial Administration.

The bill you are considering today, S.1532, is consistent with the policies and standards to which I have referred, and supported by the American Bar Association without reservation.

Examination of potential jurors by only the trial judge must necessarily fall short of the mark. The judge does not have the intimate familiarity with the details of the case, details which may well alert an interrogator to meaningful nuances in juror responses. Counsel, on the other hand, with the knowledge of all elements of the case, will recognize significant problems in answers to appropriate questions and press essential points with further questioning. Some judges are particularly accommodating in putting questions proposed by counsel; others are not. But in neither instance is the result as effective as questions directly propounded by counsel.

Also, jurors have been known to shape their responses to judges along lines they expect the judges want to hear. The authoritarian judge figure does impact on answers given by prospective jurors.

A standard question often asked by a judge is "Can you be fair?" How many prospective jurors will say to a judge -- the representative of justice -- "I cannot be fair"? How many jurors will give such an answer in a public courtroom anyway. Isn't it more likely that we will search out the ability to be fair by specific questions as to background, experiences, etc. asked by people intimately conversant with the issues and the parties -- that is, getting the facts and drawing the ultimate conclusion on their own? As a matter of fact, prospective jurors themselves are often unaware of biases, prejudices or misconceptions on their part.

It has been argued that Lawyers will make jury selection a part of their opening argument, that they will attempt to prejudice the prospective jurors by their questions and demeanor. This does not have to be. The judge is in charge. He has the authority and responsibility to see that counsel stays within proper bounds. S.1532 in no way denigrates this authority and responsibility. On the contrary, in specific terms it provides "The court may impose such reasonable limitations as it deems proper with respect to the examination of prospective jurors..."

Some concern has been expressed that participation of counsel in voir dire will unduly lengthen the jury selection process. Again, with the judge having the authority proposed in S.1532 there is no reason for this to happen." Further, there is some statistical evidence that the voir dire may even be completed in less time. A 1977 survey published by the Federal Judicial Center revealed that 90% of all voir dire in Federal criminal cases was estimated to take less than two hours. The greater control exercised by the judge the longer it took, averaging 71.3 minutes, while in counsel-conducted voir dire the elapsed time averaged 45 minutes.

In summary, the present jury selection practices in the Federal courts are inefficient, ineffective, and prejudicial. The change which would be brought about by the enactment of S.1532 will make the jury selection system a better one, tending more to the selection of fair and impartial jurors able to decide cases without bias or prejudice. Federal judges will continue to have control over the jury selection process, and authority to preclude any abuses. We urge the prompt, favorable reporting of the bill.

Mr. Cleary and I will be pleased to respond to any questions you may have.

PREPARED STATEMENT OF JOHN P. ARNESS

My name is John P. Arness, and I am a member of the law firm of Hogan & Hartson, located in Washington, D.C. I am appearing before the Committee today in my capacity as Chairman of the Committee on Federal Rules of the American College of Trial Lawyers. The American College has a direct and immediate concern with trial procedure in federal and state courts, and I appreciate the opportunity to present the College's views on Senate Bill 1532. We believe the bill represents a significant and beneficial amendment to federal court trial procedure and should be adopted.

Under the existing versions of Rule 24(a) of the Federal Rules of Criminal Procedure and Rule 47(a) of the Federal Rules of Civil Procedure, a federal trial judge may permit attorneys to conduct a voir dire examination of prospective jurors or the court may itself conduct the examination. In practice, federal judges have used the permissive language of these rules to exclude participation by attorneys in the voir dire process. According to a 1977 survey of federal judges by the Federal Judicial Center, 75 per cent of all federal judges exclude oral participation by counsel during voir dire. This practice is in contrast to that which exists in many state courts and to the traditional norm in federal court before an over-reaction by federal judges to what they viewed as unnecessary or improper voir dire examination led to the near elimination of party participation in the voir dire examination.

Participation by trial counsel in the voir dire process has wide support in the legal community. The American Bar Association's Standards relating to the Administration of Criminal Justice: Trial by Jury, Standard 15-2.4, suggests that counsel for each side be given the opportunity, subject to reasonable time limits, to question jurors directly, both individually and as a panel. At its Midwinter meeting in 1975, the American Bar Association adopted a resolution supporting the concept of voir dire by counsel as a matter of right in federal civil and criminal cases.

It appears that opposition to participation by trial counsel in voir dire is centered almost exclusively in federal judges, who oppose such participation on the grounds that it is time consuming and unnecessary. Statistical evidence, however, indicates that involving trial counsel does not extend the length of trial proceedings though it may add immeasurably to the ability of counsel to exercise their client's rights

to challenge jurors. A 1977 survey published by the Federal Judicial Center revealed that 90 per cent of all voir dire examinations in federal criminal cases take less than two hours, with an average time of 50 minutes. The greater the control exercised by the judge the longer it took (an average of 71.3 minutes) while counsel-conducted voir dire was shorter (an average of 45 minutes).^{*/}

Even if counsel-conducted voir dire took slightly longer than examination by the court, participation by counsel would still not impose a burden on the federal court system sufficient to justify denial of the opportunity for counsel to participate in this significant aspect of the trial process. For the year ending June 30, 1980, there were 7,353 jury trials in the federal system, or less than 15 per judge per year.^{**/} An increment of a few additional minutes per trial will not cause chaos in the system, as opponents of counsel-conducted voir dire would claim.

Moreover, counsel-conducted voir dire would remain under the close control of the trial judge even if S.1532 is adopted. No one, of course, challenges the right or propriety of such control, which could extend even to pretrial submission of voir dire questions, with the right in counsel to ask follow-up questions depending on the responses received. Federal judges would continue to exercise control over voir dire examinations that threaten to impede the effective functioning of the federal trial system, but they would be denied the right to exclude counsel totally from the voir dire examination, as is frequently done now.

^{*/} Bermant and Shepard, The Voir Dire Examination, Juror Challenges and Adversary Advocacy (Federal Judicial Center 1978) 13, 14, 26-27.

^{**/} 1980 Annual Report of the Director, Administrative Office of the U.S. Courts, Table C-8.

The need for counsel participation in the examination is obvious to those members of the Committee who have practiced as trial lawyers. Far too often judge-conducted voir dire is only a litany of rhetorical questions, a perfunctory performance that provides no basis for the exercise of challenges, either for cause or pre-emptory. General questions of whether the jurors can be fair and impartial are never effective in producing disclosure of a disqualifying state of mind. There must be an exploration of the backgrounds and attitudes of the jurors through questions framed with the facts and issues in a case in mind. Such questions can best be framed and asked by trial counsel rather than the trial judge.

S.1532 does no more than give counsel a minimal right to participate in voir dire examination. However, it does preserve a right that is generally denied in federal courts today. The bill affirms the trial judge's undisputed right to control the course of voir dire without permitting the trial judge to pre-empt that right totally. S.1532 is but a small step forward but it is a step that should be taken. I urge its favorable consideration by the Committee.

PREPARED STATEMENT OF FRANCIS H. HARE, JR.

My name is Francis H. Hare, Jr. I am an attorney and a partner in the firm of Hare, Wynn, Newell and Newton, 700 City Federal Building, Birmingham, Alabama 35203. I have been practicing law twenty-two (22) years, almost exclusively in cases in which I represent the plaintiff in a civil action claiming damages for personal injuries. Between thirty and forty percent of my practice has been in federal courts. The summary of my professional biography is attached. Of significant relation to the present topic is the fact that I wrote the chapter on voir dire in the book entitled "Anatomy Of A Personal Injury Lawsuit" published by the Association of Trial Lawyers of America in 1967 and re-edited and reprinted in 1981. Over the years I have made twelve to fifteen speeches to various trial groups over the country on voir dire.

I strongly support S.1532 which (in part) amends Rule 47(a) of the Federal Rules of Civil Procedure and protects the important right of civil litigants or their attorneys to personally participate in the voir dire examination of prospective jurors.

I am not going to attempt a detailed exegesis on voir dire in this statement. The attached chapter I wrote for the "Anatomy Of A Personal Injury Lawsuit" (which will be attached) represents my best efforts in that regard.

I want to first make a few overall comments about why it is so terribly important for trial counsel to personally participate in the examination of prospective jurors and then to conclude with one or two responses to what I understand constitutes the major objections to S.1532.

WHY TRIAL COUNSEL'S PERSONAL PARTICIPATION IS ESSENTIAL

The single most important aspect of the American system of justice is a fair and impartial jury. Within the context of a particular case, this generic goal translates into the most fair

and most impartial jury for that particular case. Every human being has some predisposition, i.e., some personal bias which will favor one side of the lawsuit or the other. The primary objective of the voir dire examination is to identify which members of the venire are most likely to be controlled or influenced by some preconceived bias. The overwhelming majority of the venire will either not be consciously aware of their bias or will be extremely reluctant to admit that it will effect their objectivity. In either event, the identification of the existence of some preconceived tendency which will favor one side or the other is not likely to surface in the prospective jurors' response to the typically solemn and uniformly authoritative inquiry by the trial judge as to whether they are so prejudiced that they could not obey their oath to be impartial. No one wants to admit that they are "prejudiced" - the compulsion to affirm their impartiality to the presiding judge is almost irresistible.

Secondly, the voir dire examination is the only opportunity trial counsel ever has to personally communicate with the individual members of the venire. A juror's personal reaction to the attorney's examination provides a vital and indispensable basis for the intelligent exercise of counsel's peremptory challenges. Jurors react or respond differently to questions from the lawyers than they do to identical questions put by the judge. These personal reactions or responses include not only the content of their answer but their tone of voice, their facial expressions and many other indefinable but important aspects of non-verbal communication. It is important to note that the attorney for one side often acquires more significant information by observing a juror's reaction to the other lawyer's voir dire than to his own.

In conclusion, the Federal Rules expressly provide for peremptory challenges as a matter of right for the sole and exclusive purpose of obtaining the most fair and the most impartial jury for the particular case in dispute. The voir dire exa-

mination has little meaning if it is not conducted by counsel for the parties. The peremptory challenges are of little value if trial counsel is not afforded an opportunity to conduct a brief but personal inquiry for the purpose of obtaining the necessary information on which to base his strikes.

RESPONSE TO OBJECTIONS TO S.1532

1. TIME.

The objection of "time" standing alone ought not to be valid. The real objection is whether the time is unnecessary or unjustified. If that were not true, then federal judges could (and should) arbitrarily limit all trials to one day.

The realization that the real question is whether the time is unjustified just takes us back to the basic merits of S.1532. That is, if trial counsel's personal participation in the conduct of the voir dire is essential to the intelligent exercise of his peremptory challenges then S.1532 should be enacted. The bill itself expressly provides that the overall conduct of the voir dire remains under the control and supervision of the trial judge.

2. ABUSE.

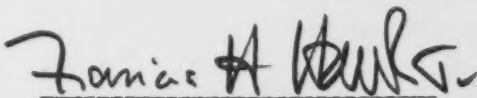
Some authors have suggested that if trial counsel were permitted to personally participate in the voir dire that they would use the occasion as an opportunity to "try their case" or otherwise inject arguments or issues unrelated to the limited purpose of voir dire. I accept this contention as being theoretically possible although in my actual experience I have seen it happen only rarely; further, the occasions on which it occurred as a consequence of a deliberate act are even more rare - numbering only two or three in the twenty-two years of my practice.

The support for this objection or contention stems from the observation that the American system of jury trials is an adversarial proceeding and an adversary can and sometimes does become over zealous. The truth of this observation, however, effects every single phase of the trial from opening statement through

direct and cross examination to final summation. No one has ever suggested that the other phases of our system of jury trials should be abolished because of the possibility of abusive behavior by an over zealous advocate. No one has ever doubted either the authority or the efficacy of a federal judge's corrective admonitions of an over zealous trial lawyer.

The final and telling answer to this contention is the simple observation that the trial lawyer who abuses voir dire is foolishly and unnecessarily hurting (not helping) his own personal credibility and his client's case - at a critical and sensitive time in the trial; viz., before the trial actually begins. The lawyer that exceeds the bounds of voir dire will, with predictable certainty, be personally reprimanded in the presence of the jury. The significance of this fact is to merely underline the strength of the observation that the enactment of S.1532 is just not likely to actually result in the conduct of abusive voir dire.

I urge this Committee to favorably endorse S.1532.



Francis H. Hare, Jr.
Attorney
Birmingham, Alabama

Enclosures 2

VOIR DIRE EXAMINATION AND JURY SELECTION

INTRODUCTION

Purpose

The purposes of the voir dire examination of the jurors include, but are not limited to, the identification and striking of those persons who are disqualified by statute from serving, those who have some relationship to the lawyers on either side of the case to be tried, those who have prior knowledge of the parties or case and who have formed opinions about the case, and those who have some preconceived bias, notion, or prejudice arising from their background, occupation, business, or environment. These things add up to the selection of a jury that will be fair and impartial to all parties. The conduct of the voir dire examination necessarily imparts information. It would be impossible not to impart information since to identify bias one must frankly question the jurors about matters that could be bias-creating factors, such as "The plaintiff in this case had consumed two martinis before he was hit by the defendant who ran the red light. Would you hold that against the plaintiff if you find that had nothing to do with causing the collision?" Thus, voir dire is a discovery process and a decision-making time for the lawyer. He decides, based on questions asked the jurors, their oral responses, and personality manifestations, who are the most qualified jurors for that particular case.

Voir dire is *not* opening statement, and it is *not* the time or place to argue the case!

294 Anatomy of a Personal Injury Law Suit

Desirability of a Jury Trial

The question of whether or not to demand a jury trial should be addressed in every case. Most often, a jury trial is desirable. Sometimes, however, because of the nature of the case on liability or damage issues or because of the nature or appearance of the client or the client's background, you may not want to demand a jury trial.

Challenging Jurors

Virtually every jurisdiction has statutes or rules which provide counsel an opportunity to eliminate jurors who they believe are not fit or qualified to hear their client's case. Although a near-infinite variety of local rules exist, there are in general two types of challenges: challenges to the array and challenges to the polls. Challenges to the array are directed at the entire jury panel and are designed to question the validity of its makeup; they are based on claims of defects or irregularities in the selection of jurors from the jury lists or in the summoning of the jurors. This type of challenge is used very infrequently. Challenges to the polls are addressed to individual jurors. There are two types of challenges to the polls: (1) a challenge for cause and (2) a peremptory challenge. A challenge for cause may be based upon a statutory disqualification, in which case nothing is left to the discretion of the court, or it may be based upon an allegation that the particular juror is biased in favor of one of the parties, in which case the court must exercise its discretion to rule on the challenge. There is no limit to the number of challenges for cause made by counsel. The peremptory challenge, on the other hand, is limited—only a specific number of prospective jurors can be eliminated by each side. When he executes a peremptory challenge, counsel need *not* give his reason. Counsel's exercise of a peremptory challenge does not involve the trial judge's discretion.

In Federal Court

Voir dire in Federal Court is limited by some U.S. District Court judges. This limitation on voir dire severely and unnecessarily restricts the need and the necessity for counsel for both sides to learn of the existence of some prejudice or preconceived bias on the part of the jurors that will literally control the outcome of the case despite the law and the facts. In a recent case the U.S. Court of Appeals for the Fifth Circuit stated:

...the real issue is whether the voir dire examination uncovers possible prejudice and bias of any juror so that a fair and impartial jury may be impaneled. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information on which to base such strikes.

and further:

...we must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties.¹

THE VOIR DIRE EXAMINATION

Purpose

Voir dire is the examination of prospective jurors to determine who among the panel will be selected to sit on a jury in a particular case. More accurately, the jury makeup is determined by a process of elimination rather than by selection, as jurors are stricken rather than chosen. The voir dire examination serves two judicially recognized purposes: (1) to test the statutory qualifications of the individual veniremen, and (2) to afford the attorneys a procedure by which they may obtain information about the prospective jurors which they *must* have if they are intelligently and fairly to exercise their challenges for cause and their peremptory challenges.

Limitations

The right to examine prospective jurors in order to test their legal qualifications is granted by statute in almost every jurisdiction, but some judges are reluctant to allow extensive voir dire examinations because of a fear of "losing control" over the proceeding. Good reasons to curtail voir dire drastically *cannot* be advanced except where inexperienced or over-eager counsel use the procedure as a means of arguing the case before the trial begins. While the argument that restricted voir dire will save time has superficial plausibility, it makes no more sense than limiting all trials to one day, closing arguments to ten minutes, or each side to one witness. There are many ways to shorten the trial, but justice should never be sacrificed in the name of speed. A proper voir dire examination, on the other hand, can actually *save* time by bringing into focus the issues of the case.

Because the point is so terribly important we repeat it. The exercise of peremptory challenges is a matter of right granted by statute. It is

¹U.S. v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977).

296 Anatomy of a Personal Injury Law Suit

an important right; it is inseparably related to the right to trial by an unbiased jury. Therefore counsel must be granted a reasonable time to make inquiries of the prospective jurors under oath. In order for counsel to strike prejudiced veniremen intelligently, he must have some knowledge, insight, or information concerning the juror's beliefs and prejudices.

In every jurisdiction which permits voir dire examination, the limits of the examination are subject to the trial court's discretion. If counsel, prior to trial, believes the trial judge will drastically curtail the examination he may wish to file a written motion requesting the privilege of conducting a voir dire examination. The motion may contain a list of the questions to topics the counsel wishes to cover, or, as an alternative, may request the court to make the necessary inquiries. Counsel may also wish to file a brief citing the authorities which support the position that a wide latitude of inquiry is permitted during voir dire examination. Should the court, at the time of the examination, limit counsel, cutting off his inquiry before counsel is satisfied, the attorney should take exception so that he will have a proper record for appellate review.

MOTIONS IN LIMINE

Purpose

Before voir dire, counsel should consider whether there are any facts harmful to the plaintiff's case which would not be admissible in evidence under the rules of his jurisdiction. Examples include (1) the plaintiff was operating a vehicle without a valid driver's license, (2) the plaintiff was issued a traffic citation as a result of the collision, (3) the plaintiff had a long record of traffic violations prior to the collision, (4) the defendant was not issued a traffic citation, (5) the plaintiff's medical bills were paid by Blue Cross or some other collateral source, (6) the plaintiff was paid his regular wages while absent from his job as a result of sick leave or vacation benefits, or some form of insurance, (7) the plaintiff's medical care was rendered free of charge, (8) the plaintiff, prior the collision, was convicted of a crime which did not involve moral turpitude, (9) the plaintiff was arrested and charged with the commission of a crime, (10) the plaintiff had a prior claim involving injury to the same area of the body injured in the case on trial, and (11) the spouse prosecuting a death action remarried prior to the date of trial. Having determined that such facts exist, counsel should make a motion to forbid the mentioning of such facts prior to the voir

dire examination. (This motion may be denominated a "motion to suppress," "motion to quash," or "motion in limine.") Although counsel may make the motion orally in the presence of the court reporter, it is better practice to file the motion in writing with a brief which cites the cases which support the proposition that the facts or matters specified are not admissible in evidence.

If prejudicial matters are brought before the jury, no amount of objection or instruction can remove the harmful effect, and the plaintiff is powerless unless he wants to forego this day in court and ask for a mistrial. Once the questions are asked, the harm is done. Thus, counsel should state in the motion that if the matter designated were brought to the attention of the jury, the plaintiff would be irreparably prejudiced, even though the court were to sustain an objection and instruct the jury to disregard the evidence. It should be made clear to the court that the purpose of the motion is to prevent a mistrial. Should the motion be granted, defense counsel will be prohibited—by order of the court—from making any reference to the facts during the voir dire examination or opening statement or making any inquiry during his examination of witnesses which might tend to bring out the suppressed matter.

Court's Authority to Grant

The power of the trial court to grant such a motion is inherent in its authority to control the conduct of the proceedings so as to insure a fair trial and in the court's right to admit or exclude evidence; this practice may not be specifically mentioned in the official rules of procedure. The use of the motion is limited only by the rules of evidence and the ingenuity of counsel.

OBTAINING INFORMATION PRIOR TO VOIR DIRE

Sources

Prior to the voir dire examination, many lawyers advise gathering information on the prospective jurors. In some jurisdictions jury lists are published in advance of the date of trial. Where this is the case, counsel has the right to make an investigation of prospective jurors as long as he does not actually approach those summoned for jury duty.

There are many sources for obtaining information concerning prospective jurors prior to the trial. Official jury lists (which are

298 Anatomy of a Personal Injury Law Suit

sometimes published by the clerk of court), may contain the name, address, and occupation of each prospective juror. In some metropolitan areas, there are jury investigating services which publish bulletins containing information about prospective jurors. If counsel is able to obtain the names of the prospective jurors prior to the time of trial, he may conduct a private investigation. Such a procedure is very expensive and is undertaken only in cases with large potential. (The investigator who is employed should be carefully cautioned not to make any effort to contact the prospective jurors either directly or indirectly.) Public records may be of great value in providing information concerning prospective jurors. Among the records which may be valuable are voter lists, city directories, court indexes, and police records. Credit bureaus can generally provide a great deal of information concerning prospective jurors. In rural areas, where the population is small and stable, local politicians and officials may know the members of the prospective panel personally. In jurisdictions in which jurors hear more than one case in a term of court, trial lawyers who have previously tried cases to members of the panel are a most valuable source. Frequently, after a verdict has been rendered, the lawyers in the case will meet with all or some of the members of the jury to discuss the verdict with them. Much information about the true philosophy of each juror can be gained in this way. Counsel who is about to try a case before a panel which has heard another case may gain much valuable information by meeting with the plaintiff's lawyer who tried the previous case to the panel.

Possible Information

Some of the facts which counsel may wish to know about each juror are as follows:

Name	Education
Age	Prior litigation, results
Occupation	Previous jury service, criminal or civil, results
Marital status	Lodge or union affiliation
Spouse's age	Sickness in family
Spouse's occupation	Disability in family
Number of children	Injuries
Residence address	Credit rating
Home owner or tenant	Prior employment in claims investigation
House valuation	Relationship with insurance
Religious affiliation	
Autos, number and date	

Light or heavy drinker
Relationship with neighbors

industry, employment, or
ownership of stock

Much of this information can be obtained at the time of voir dire examination. The amount of pretrial investigation of the prospective jurors will necessarily be conditioned by the prospective value of the case.

CONDUCTING THE VOIR DIRE

Initial Contact

Counsel meets the jury for the first time during the voir dire. The conduct of the examination requires that counsel acquaint the jury with the general nature of the case. The jurors' response to the particular type of case involved will form the basis for the judgments counsel will have to make concerning the exercise of his challenges. He also has the opportunity to introduce himself to the jury and, hopefully, create a favorable impression in their minds toward himself, his client, and the case he is about to present. Plaintiff's counsel, who generally addresses the jury first, has the benefit of the psychological principle of "primacy," that is, people tend to believe what they hear first about any given matter.

It is imperative that counsel have his theory of the case firmly settled in his mind before he plans the voir dire examination, for his goal is to select the best possible jurors for the particular case being tried. It is only when he understands the theory of his case that he can make sound judgments concerning the type of persons who will make "good" jurors and the type to be eliminated. Once counsel has made some determination of the type of juror he wishes to have empaneled, he should list the topics of inquiry indicated for the particular case. He may wish to draft a number of specific questions for use during examination. Some lawyers make the mistake of asking the same set of "pat" questions in every case. However, each case is different; consequently, the content and conduct of each voir dire should be different. Counsel should exercise as much creativity and imagination in the planning and conduct of his voir dire as he does in the presentation of his case in chief.

How to Avoid Giving Offense

There is always the danger that some of the prospective jurors will be offended by the questions asked on the voir dire examination and

300 Anatomy of a Personal Injury Law Suit

consider them as unnecessary intrusion into their private lives. Plaintiff's counsel may wish to explain to the entire panel at the beginning of the voir dire that his purpose in asking questions is not to pry into their personal lives or to embarrass them; he should explain also that both he and defense counsel are granted the right to interrogate the jurors and that the procedure is used in every case tried to a jury and is of ancient origin. Counsel should state that in conducting the examination he is acting as the attorney for the plaintiff and as an officer of the court and that his goal is to aid in the selection of the twelve jurors best suited for the particular case being tried. Counsel may wish to explain that only one-half of the venire will actually serve on the final jury and if it turns out that they have the opportunity to serve on this particular case, that fact does not mean that the lawyers for either the plaintiff or the defendant consider them to be "unfit" in any general sense. Counsel may tell the venire that every human being, by reason of environment and personal experiences, probably has some preconceived tendencies which favor one side or the other. Counsel may add that it is a mark of courage and fairness for a person to admit that he may have difficulty in being totally impartial in his hearing of a particular case. It should be emphasized that a fair trial can only be had if each juror will be outspoken and frank in stating whether or not he can be completely fair, impartial, and unbiased with regard to the parties and the issues involved in the particular case. Statements of this type will not necessarily insure that the prospective jurors will honestly admit feelings of possible bias or prejudice, but they may be of some aid.

Atmosphere

Many jurors will probably be sitting in the jury box for the first time and will be nervous and uncertain. They will appreciate it if counsel establishes a casual atmosphere in which they are allowed to relax. Plaintiff's counsel should, however, be cautious in his use of humor.

Conflicting Relationships

The judge in all likelihood will ask the entire panel if any of them are related to or know any of the parties or their attorneys. If the court does not make such inquiry, this should be counsel's first question. He may also ask the jurors whether they have any acquaintanceship, either professional or social, with any of the witnesses who he expects will testify for each side.

The Nature of the Case

Though voir dire examination is not the appropriate time for a detailed discussion of the case, it is proper for the jury to be told something about the nature of the case as a preliminary basis for asking them specific questions. Once the jurors have been told what the case involves, they should be asked whether they have been involved in a situation similar to that of the plaintiff or defendant. Each juror should also be asked whether he has been involved in any accidents which produced injury, whether he has been a plaintiff or defendant in any lawsuit, and whether he has had any injuries similar to those claimed by the plaintiff. Counsel should ask whether any members of the juror's immediate family have been injured as the result of accidents, been sued or filed claims, or had injuries similar to those claimed.

Connections with the Insurance Industry

Counsel for plaintiff will generally ask each juror whether he has ever been involved in the investigation or evaluation of claims and whether he has been employed by, held office, or owned stock in an insurance company which writes casualty or liability insurance. (Before counsel for the plaintiff asks any question which relates to the insurance industry, he must carefully check the law of his jurisdiction to determine what is permissible.)

Extended Trial

When plaintiff's counsel expects that the case will take more than a few days to try, he should ask the jurors whether an extended trial would be a major inconvenience. Frequently, counsel will determine that certain jurors are reluctant to serve because of the pressures of business or other commitments; where such reluctance appears, it is better to exclude the juror from service because an impatient juror will generally not be attentive. Both sides may consent to dismissing such a juror for cause. Neither plaintiff nor defendant wants a juror who cannot concentrate on the evidence.

Confronting Problems in Plaintiff's Case

When the plaintiff's case has a major problem, generally it would be wise to discuss it openly during voir dire examination if he is relatively certain that the defendant knows of it and intends to exploit it. When the plaintiff brings out the problem on voir dire, he may steal some of the defendant's thunder and give the jurors reason to believe

302 Anatomy of a Personal Injury Law Suit

that he and his client are open and honest. Equally important, he has the opportunity to secure from each of the jurors assurance that the problem in itself will not necessarily affect their judgment and prevent them from being fair and impartial jurors. For example, suppose a key witness for the plaintiff is an ex-felon. The jury could be told the following:

This accident was witnessed by John Doe. That is a fact over which the plaintiff had no control. It could have happened in the presence of any citizen in this community. It is proper for you to know that earlier in his life Mr. Doe made a mistake for which he was imprisoned and for which he has paid his debt to society. That is also a fact over which plaintiff had no control. Can any of you tell me now that I cannot win this case for my client solely because Mr. Doe who saw this accident has a criminal record?

Other "problems" which plaintiff's counsel may wish to expose on voir dire include (1) plaintiff was under the influence of alcohol at the time he was injured, (2) plaintiff belongs to a minority group, (3) defendant belongs to a profession which is held in high esteem, (4) plaintiff is suing a member of his family, (5) plaintiff is suing the driver of a car in which he was a guest passenger, (6) plaintiff was at one time convicted of a crime, (7) plaintiff has other lawsuits involving the same injury, (8) plaintiff has prior or subsequent injuries to the same part of the body which is the subject of the claim, (9) plaintiff was using drugs at the time he was injured, and (10) plaintiff was riding a motorcycle when he was hit.

Professional Negligence Cases

If the case involves claims of professional negligence (such as medical or legal negligence) an effort must be made to find out if the jurors believe that doctors or lawyers should be held to the standard of care required under the circumstances. Negligence is negligence whether it arises from a layperson running a stop sign and injuring someone else, a doctor leaving a surgical instrument in a patient's abdomen, or a lawyer letting a statute of limitations run.

Products Liability Cases

If the case involves a claim that a defective product caused an injury, counsel needs to ascertain that the jurors have no quarrel with the law on strict liability or breach of express and implied warranty. So much has been written in the news on this subject that inquiry about preconceived notions in this area should be made.

Jury Co-operation

Another question that counsel must have in mind is how the individual jurors will affect each other. Will one person dominate their deliberations or can they work together in a spirit of co-operation to insure that justice is the result?

Explaining Objections

If counsel foresees that he may be forced to make repeated objections to offers of evidence by the defendant, he will wish to explain to the jury during voir dire examination that objections are based on exclusionary rules of evidence established by the courts and that lawyers are required to "play the game" by the rules. He may also wish to explain further that he may have to make objections in an effort to discharge his obligation to his client. He can then ask the jury whether they will hold it against either lawyer if he makes objections during the course of the trial.

Cases Based on Unpopular Legal Standard

When counsel for the plaintiff is basing his case upon a statute or rule with which he believes the public is not in sympathy, it is wise to tell the jurors during voir dire that he believes the court will so charge them. He should state the law or rule upon which he is relying. He will then ask the jurors whether, assuming the court so charges, they will have any problem in following this law. Counsel should obtain the assurance of each juror that he will accept the court's instructions of law whether or not those instructions comply with the juror's ideas as to what the proper legal standards should be.

Burden of Proof

The average juror's exposure to court proceedings ordinarily comes from television and newspapers. By and large, jurors are exposed to criminal trials and to the special standard of burden of proof of the criminal law—beyond a reasonable doubt. Thus, many prospective jurors have the mistaken idea that the plaintiff in a personal injury case must prove his case beyond a reasonable doubt. Counsel for plaintiff must meet this problem head-on at the outset of the trial. It may be handled in the following manner.

As you know, this is a civil case and not a criminal case. In a civil case, the plaintiff has the burden of proof. Because this is a civil case, I believe that the judge will tell you when he charges you on the law that the plaintiff must prove his case by a preponderance

304 Anatomy of a Personal Injury Law Suit

or greater weight of the evidence. You will not hear the court tell you that the plaintiff must prove his case beyond a reasonable doubt. This is the standard of the criminal law and *not* the standard which will be used in this case. If the judge instructs you that the plaintiff must prove his case by a preponderance of the evidence and need *not* prove his case beyond a reasonable doubt, will any of you have problems in applying this law or will you be reluctant to do so?

Experienced Jurors

When voir dire examination indicates that a prospective juror has served on a jury in another case, the following questions may be indicated:

Is there anything that occurred in the other case in which you have served that would make it difficult for you to be completely fair and impartial in this case?

Do you think that you could decide this case which is being presented today on its own facts regardless of the different situations and testimony you have seen in the other case you have heard?

High Damage Cases

In a case involving serious injuries in which the plaintiff's counsel is seeking a large sum of money, it is wise to inquire during voir dire as to whether any of the jurors have any preconceived notion or belief that would prevent them from returning a large verdict. Many jurors have read newspaper or magazine articles attacking high verdicts. Some believe that a high verdict will be reflected in their own insurance rates. Counsel may handle the matter in the following fashion:

If you are satisfied that my client is entitled to a verdict in this case, would you be willing to award damages that are fully commensurate with the injuries proved even though they meant returning a verdict for a large sum of money, or would you resist returning such a verdict simply because by the process of arithmetic and the law of damages you would arrive at a substantial sum? In other words, would you reduce the amount of the verdict you arrived at just because when it is all added up it seems like a lot of money?

Counsel should recognize that today there is a constant stream of articles and publications which cast a dark shadow upon persons seeking money damages for personal injury. There can be little doubt that propaganda of this sort has influenced many members of the public.

Many jurors are skeptical of people who seek legal redress and pray for compensation for a personal injury. Plaintiff's counsel should ask whether any of the jurors have ever read or heard anything about personal injury claims which would, for any reason, prevent them from reaching a verdict based solely upon the law and the evidence. Counsel may wish to ask the jurors whether they have any preconceived notions that people who employ the courts to seek damages for personal injuries are not entitled to an award.

In short, he should seek to determine whether any of the jurors have *any* preconceived notions unfavorable to the plaintiff and his effort to obtain redress and compensation for his loss.

EXERCISING CHALLENGES

Statutory Disqualification

Legal qualifications for jury service vary from jurisdiction to jurisdiction. Before counsel enters the court room he should check these qualifications carefully. There are two general categories of qualifications. The first is concerned with requirements for citizenship, residency, age, and criminal record. The second concerns itself with relationship by blood or marriage to the attorneys and parties and business relationships which would tend to give the juror an interest in the outcome of the litigation. If a juror is disqualified by statute, counsel or the court on its own motion will generally strike the juror for cause.

Bias

As noted above, statutory disqualification is not the exclusive criteria for the exercise of a challenge for cause. If voir dire examination indicates that there is any matter which would probably affect the juror's attitude and influence his decision making ability so that he would not be objective and impartial, a challenge for cause is indicated. That is, a juror who, during voir dire examination, admits that he has a bias or a feeling which he believes would keep him from being completely fair and impartial may generally be stricken by a challenge for cause.

Since the number of peremptory challenges is limited, it is *not* suggested that counsel use one if the objectionable juror can be excused by a challenge for cause. Not infrequently, the juror himself, if his sense of what is fair and right is properly addressed, will excuse himself. This does not mean that counsel should ask the juror whether

306 Anatomy of a Personal Injury Law Suit

he would be prejudiced against the plaintiff. Such an inquiry will invariably be met by a negative response. But jurors will frequently admit that they have certain feelings and preconceived notions which may influence their judgment. When plaintiff's counsel encounters a juror who admits that he would have some problem in accepting the law of the court or in awarding substantial damages or some preconceived notion which might prevent him from being fair and impartial, counsel may handle the matter as follows:

Juror X, you are aware from what I have stated before that I, defense counsel, and the court are seeking the twelve best possible jurors for this particular case. You have candidly told me that you have some feeling which you believe might prevent you from being the best particular juror in this case. I am sure that all of us here in court greatly appreciate your candor and honesty. Because of your feelings, would you prefer to step down and be allowed to sit on another jury? Putting it another way, would you feel more comfortable if you were not required to pass judgment on this particular case.

By handling the matter in this fashion, counsel may be allowing the juror to excuse himself, thereby saving one of his peremptory challenges.

Types of Jurors to Avoid

Although it is impossible to state categorically what type of person will make a good plaintiff's juror and what type will make a poor one, some generalizations can be made. Counsel for the plaintiff should have second thoughts about accepting the spouse of a physician, a nurse, or a policeman. Many doctors view complaints of their patients with a jaundiced eye, transmitting such attitudes to their spouses. Nurses and policemen, by virtue of their work, are constantly exposed to human suffering and probably have developed psychological mechanisms to blot out human misery and suffering.

In selecting the jury for the trial of a case in which expert evidence is to be used, counsel is wise to strike a juror who, by reason of his background or occupation, has some particular knowledge of the subject to which the expert witness is going to testify. The witness may announce an opinion in some casual matter which is at variance with the juror's opinion, and it may nullify everything else the witness has said. Further, the expert on the stand may evoke a combative or competitive impulse in this type of juror. Also, if it should appear that

there is someone on the jury who is likely to dominate his fellow jurors, either by virtue of his position, expertise, or personality, it may be well to strike him. The fundamental purpose of the jury system is defeated by a "one person jury."

Where the plaintiff is an attractive young woman, older female jurors may be unsympathetic. Jurors who have themselves been sued may tend to view all claimants with cynicism. Jurors who own commercial properties or operate small businesses may regard a personal injury case as a threat to their own insurance premiums; they are particularly dangerous in a case in which a plaintiff is suing a landowner for negligent maintenance of property. Small home owners are generally viewed as unfavorable jurors in actions against municipalities, for it is possible they will fear that their taxes will be increased if a large verdict is returned. Accountants and engineers are generally considered undesirable jurors for the plaintiff. Persons living in areas where racial or religious strife is known to have occurred should be examined carefully upon voir dire in a case in which the plaintiff is a member of a minority group.

A juror who has sustained an injury similar to the one claimed by the plaintiff may be considered as "an authority on the subject" by his fellow jurors. Such a juror is particularly suspect if he has accepted a relatively small award under workmen's compensation or from the government.

Jurors' Attitudes Toward Counsel

Counsel's decision as to which jurors he will strike is based not only on the verbal information gathered during the voir dire but also upon his instinctive impressions of the jurors. As the prospective jurors enter the jury room and fill the jury box, counsel should focus his entire attention upon them. He should observe their walk, speech, and manner. If counsel's immediate reaction to a juror is unfavorable, he should observe closely how the juror reacts to him personally and to his adversary. If at the conclusion of voir dire, counsel still intuitively senses a negative reaction to a particular juror—an indefinable but pervasive sense of antagonism—he may safely assume the juror feels the same way about him. Counsel should strike him.

Some lawyers recommend that early in the voir dire a prospective juror be given an insignificant command, such as, "Now sit back and

308 Anatomy of a Personal Injury Law Suit

relax," to test the juror's reactions. If he does appear to relax, counsel may assume that the juror is personally receptive to him; if he appears to sit up straighter in his seat, counsel can assume that there is a certain resistance which may make him less receptive to counsel's position and contentions.

Announcing Challenges

At the conclusion of the voir dire examination, the plaintiff's counsel is required to announce his challenges for cause before the defense attorney has to proceed with his examination. Generally, plaintiff's counsel is not required at that time to exercise his peremptory challenges. In most jurisdictions, the plaintiff may wait until the defense counsel has completed his examination before he has to make his peremptory statutes.

The manner of exercising peremptory challenges varies from jurisdiction to jurisdiction. In some courts, counsel rises and states the name or number of the juror whom he wishes to excuse. In others, peremptory challenges are exercised in writing so that the juror stricken and the remaining jurors are not informed as to which lawyer is striking which jurors. It is hazardous to use all of your peremptory challenges without any inkling as to whether the replacements will be more desirable than those challenged. Thus, before counsel uses his peremptory challenges, he must analyze the relative desirability of the juror who will replace the challenged juror.

CONCLUSION

Finally, once the jury has been selected, counsel should view the panel with a positive frame of mind and appear completely confident and satisfied that the best possible jurors have been selected for the case being tried.

ANNOTATIONS

Treatise

Wagner, Jury Selection.

Am Jur Trials—Articles

Selecting the jury—plaintiff's view, 5 AJT 143-246.

Selecting the jury—defense view, 5 AJT 247-284.

Am Jur Trials—References

Voir dire and jury selection in motorboat accident litigation, 7 AJT 100-108.

Voir dire and jury selection in contact sports injury cases, 7 AJT 247-250.

Voir dire and jury selection in elevator accident cases, 7 AJT 414-418.

Voir dire and jury selection in child-pedestrian accident cases, 9 AJT 473-480.

Voir dire and jury selection in products liability cases, 12 AJT 150-158.

Voir dire and jury selection in boiler explosion cases, 13 AJT 415-418.

Voir dire and jury selection in glass door accident cases, 14 AJT 172-183.

Voir dire and jury selection in skiing accident litigation, 13 AJT 283-284.

Voir dire and jury selection in drug product liability and malpractice cases, 17 AJT 150-153.

Voir dire and jury selection in child death or injury cases, 20 AJT 674-687.

Am Jur Proof of Facts

Bias or prejudice of juror, 2 POF 495-525.

Proof of prejudice of prospective juror, 20 POF 241-244, 250-258.

Systematic exclusion, 9 POF2d 407-494.

Am Jur

Impaneling, examining, and challenging jurors, 47 Am Jur 2d, Jury §§ 195-212.

ALR Annotations

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror, 11 ALR3d 859.

310 Anatomy of a Personal Injury Law Suit

Counsel's use on voir dire examination, in relation to damages in personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence, 86 ALR2d 241.

Propriety of inquiry on voir dire as to juror's attitude toward amount of damages asked, 82 ALR2d 1420.

Voir dire inquiry, in personal injury or death case, as to prospective jurors' acquaintance with literature dealing with amounts of verdicts, 89 ALR2d 1177.

Previous knowledge of facts of civil case by juror as disqualification, 73 ALR2d 1312.

Professional or business relations between proposed juror and attorney as ground for challenge for cause, 72 ALR2d 673.

Relationship of juror to witness in civil case as ground of disqualification, 85 ALR2d 851.

Prejudicial effect of reference on voir dire examination of jurors to settlement efforts, 67 ALR2d 560.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case, 99 ALR2d 7.

Political prejudice of proposed juror as proper subject of inquiry or ground of challenge in voir dire in civil case, 72 ALR2d 912.

Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel, 76 ALR2d 678.

Economic prejudice of prospective juror (based on occupational grounds, i.e. labor union or corp.) as proper subject of inquiry or ground of challenge on voir dire in civil case, 72 ALR2d 913.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire, 20 ALR3d 1420.

Membership in racially biased or prejudiced organization as proper subject of voir dire inquiry, 63 ALR3d 1052.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 ALR3d 126.

Use of peremptory challenge to exclude from jury persons belonging to a class or race, 97 ALR3d 14.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire, 95 ALR3d 172.


ARKANSAS TRIAL LAWYERS ASSOCIATION

1700 FIRST NATIONAL BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 372-5847

PRESIDENT
Wm. R. Wilson, Jr.
P.O. Box 71
Little Rock, Arkansas 72200

PRESIDENT-ELECT
Bobby R. McDaniel
4087 South Main
Second Floor
Jonesboro, Arkansas 72401

SECRETARY
Robert R. Chair
100 Court Plaza Building
81 South Sixth Street
Fort Smith, Arkansas 72301

TREASURER
Terry Hester
6801 South Main
Jonesboro, Arkansas 72401

EXECUTIVE DIRECTOR
Harden V. Rafter
1700 First National Building
Little Rock, Arkansas 72201

November 10, 1981

Francis H. Hare, Jr., Esquire
Hare, Wynn, Newell and Newton
7th Floor, City Federal Building
Birmingham, Alabama 35203

Dear Brother:

I note from the November 6, 1981, "Federal Legislative Bulletin" from all ATLA that you are going to testify on behalf of our Voir Dire bill (S.1532) on November 16, 1981.

I am very pleased that we have an advocate of your caliber testifying for this important legislation. In my judgment, a denial of voir dire examination by counsel is a denial of due process.

I assume that the Judicial Conference of the United States will take its usual position that the lawyers abuse the process, thus, voir dire takes too much time. There are several answers to this I think:

1. Their position is the classic "throw the baby out with the bathwater" stance -- if a lawyer abuses the process in a given case, then the Judge should use the discretion and authority given him to stop such abuse.
2. Most important. Justice shouldn't be put on a cost accounting, time accounting basis. The Judicial Conference has worshiped at the altar of "judicial economy of time" long enough.

It is true that lawyer voir dire will take some additional time. So does opening statement, cross-examination, closing argument, etc. I am always attempted to ask the Judge who denies me the right to voir dire to go ahead and make my opening statement for me too.

Please take hide, hair and all in your presentation.

Cordially,

Wm. R. Wilson, Jr.

WRW/kdm

Senator HEFLIN. Thank you. We now stand in recess.

[Whereupon, at 12:45 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

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